Supreme Court of the United States

OCTOBER TERM, 1966

No. 1083

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

COMPLAINT IN CONDEMNATION AND DEMAND FOR JURY TRIAL—Filed August 13, 1963

[fol. 2] 1. This is an action of a civil nature brought by the United States of America at the request of the

Secretary of the Army for the taking of property under power of eminent domain and for ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is:

Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 258a); and acts supplementary thereto and amendatory thereof;
Act of April 24, 1888 (25 Stat. 94, 33 U.S.C. 591);
Act of March 1, 1917 (39 Stat. 948, 33 U.S.C. 701);
Act of May 17, 1950 (Public Law 516, 81st Congress);
Act of October 24, 1962 (Public Law 87-880);

3. The public use for which said property is taken is to provide for the construction of a project for the improvement of navigation, for flood control and for other uses incident thereto in connection with the establishment of John Day Lock and Dam Project and for such other uses as may be authorized by Congress or by Executive Order.

4. The estate taken for said public use is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is located in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, and more particularly described in Exhibit "A" annexed hereto and by this reference made a part hereof.

6. The persons having or claiming an interest in the property whose names have been ascertained by a reasonably diligent search of the record are listed in Exhibit "B" annexed hereto.

7. Gilliam, Morrow, Sherman and Umatilla Counties, municipal corporations, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. On the 13th dau of August, 1963, plaintiff caused to be filed in this Court in this cause a Declaration of Taking of the estate set out herein in the land described in Exhibit "A" annexed hereto, and simultaneously there-

with there was deposited in the Registry of this Court the sum of $15,665.00 as estimated just compensation to [fol. 3] be paid for the taking of said estate in said land.

WHEREFORE, plaintiff demands judgment that said property and estate be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

DATED at Portland, Oregon, this 13th day of August, 1963.

UNITED STATES OF AMERICA

SIDNEY I. LEZAK
Acting United States Attorney

/s/ Joseph E. Buley
Assistant United States Attorney
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by Plaintiff.

/s/ Joseph E. Buley
Assistant United States Attorney

[fol. 4] EXHIBIT "A" TO COMPLAINT

TRACT 1617-1

All that portion of the northeast quarter of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Gilliam County, State of Oregon, which lies northeasterly of the center of the main channel of the John Day River.

The tract of land above described contains 10.16 acres, more or less, of which 4.18 acres lie below the ordinary high water line and within the John Day River.

TRACT 1617-2

All that portion of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Sherman County, State of Oregon, which lies southwesterly of the center of the main channel of the John Day River and northeasterly of a traverse line described as follows:

> Beginning at a point lying northerly of the east-west center line of said Section 4, which point lies North 66° 18′ 56″ West, a distance of 2316.32 feet from the quarter section corner lying on the east line of said Section 4; thence South 30° 29′ 36″ East, a distance of 3133.38 feet; thence South 51° 32′ 31″ East, a distance of 1200.00 feet to a point lying easterly of the east line of said Section 4, which point lies North 53° 00′ 31″ East, a distance of 322.34 feet from the southeast corner of said Section 4, and said point being the point of terminus of the above described traverse line.

The tract of land above described contains 41.60 acres, more or less, of which 6.89 acres lie below the ordinary high water line and within the John Day River.

TRACT 2164

All that portion of the West half of the East half of Section 28, Township 3 North, Range 21 East of the

Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of the southwest quarter of the northeast quarter of said Section 28, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East, a distance of 620.40 feet;

thence North 48° 15′ West, a distance of 351.12 feet;

thence South 39° 45′ West, a distance of 620.40 feet, to the point of beginning.

There is excepted therefrom all that portion lying northeasterly of the southwesterly right of way line of the existing John Day Highway.

There is also excepted all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch Line.

The tract of land above described contains 1.00 acres, more or less.

[fol. 5] TRACT 2165-1

All that portion of the southwest quarter of the northeast quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of said southwest quarter of the northeast quarter, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence North 32° 00′ East to the southwesterly right of way line of the John Day Highway;

thence southeasterly along said highway right of way, to a point on a line bearing North 39° 45′ East from the point of beginning;

thence South 39° 45′ West to the point of beginning.

There is excepted therefrom all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch line.

The tract of land above described contains 0.05 of an acre, more or less.

TRACT 2165-2

All that portion of the northwest quarter of the southwest quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County Oregon, being more particularly described as follows:

Commencing at a point on the North line of said northwest quarter of the southeast quarter, said point being West 2,129 feet from the quarter corner common to Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East to the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch) and the TRUE POINT OF BEGINNING:

thence continuing North 39° 45′ East to the southerly right of way line of the John Day Highway;

thence southeasterly along said highway right of way to the point of intersection of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch);

thence northwesterly along said northerly railroad right of way line to the point of beginning.

The tract of land above described contains 0.14 of an acre, more or less.

TRACT 2403

Government Lots 1, 2, 3 and 4 in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

[fol. 6]

TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

TRACT 2528

A strip of land 200 feet in width, being 100 feet wide on each side of the center line of the existing main track of the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across Government Lots 1, 2, 3 and 4 of Section 10, Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon, containing 25.20 acres, more or less.

TRACT 3300

All that portion of the west 542 feet of the south half of the southwest quarter of Section 14, Township 5 North,

Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company containing 8.26 acres, more or less.

TRACT 3305

All that portion of the east 400 feet of Government Lot 2, Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of a line described as follows:

Beginning at a point on the east line of said Section 14, said point lying north, a distance of 1700 feet from the southeast corner thereof;

thence South 80° 05′ West to a point on the south line of said Lot 2 and point of terminus of the above described line.

The tract of land above described contains 5.04 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 7] TRACT 3313

The east 359.23 feet of the west 718.46 feet of Government Lot 4 in Section 13, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the following described line:

Beginning at a point on the west line of said Section 13, said point lying north a distance of 1700 feet from the southwest corner thereof;

thence North 80° 05′ East, a distance of 800 feet to the point of terminus of the above described line.

The tract of land above described contains 7.02 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 8] EXHIBIT "B" TO COMPLAINT

TRACT NO. 1617-1
TRACT NO. 1617-2

Estimated just compensation—$2,900.00

James Fox) husband and
Emma Fox) wife

George L. Fox) husband and
Lucile H. Fox) wife

TRACT NO. 2164

Estimated just compensation—$1,100.00

A. H. Harding) husband and
Esther E. Harding) wife

H. G. Gosney, doing business as Umatilla Sand & Gravel Company

TRACT NO. 2165-1
TRACT NO. 2165-2

Estimated just compensation—$100.00

George Shane, Jr.

TRACT NO. 2403
TRACT NO. 2514

Estimated just compensation—$7,800.00

R. B. Rands) husband and
Josephine Rands) wife

Ferdinand Emberger) husband and
Jane Doe Emberger) wife

Royal H. Rands) husband and
Louise Rands) wife

West Extension Irrigation District
Northern Pacific Railway Company
State of Oregon

TRACT NO. 2528

Estimated just compensation—$180.00

Fannie Slevin

Ferdinand Emberger) husband and
Jane Doe Emberger) wife

TRACT NO. 3300

Estimated just compensation—$125.00

Clyde Hoyt) husband and
Nellie Hoyt) wife

James F. McMillin) husband and
Madeline McMillin) wife

West Extension Irrigation District

[fol. 9]

TRACT NO. 3305

Estimated just compensation—$160.00

Clyde Hoyt) husband and
Nellie Hoyt) wife

Robert Hoyt) husband and
Thula Hoyt) wife

West Extension Irrigation District

TRACT NO. 3313

Estimated just compensation—$3,300.00

Marvin Simmons) husband and
Norma J. Simmons) wife

Northern Pacific Railway Company

West Extension Irrigation District

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

341.47 ACRES OF LAND, MORE OR LESS, SITUATE IN THE COUNTIES OF GILLIAM, MORROW, SHERMAN, AND UMATILLA, STATE OF OREGON; AND JAMES FOX, ET AL., DEFENDANTS

DECLARATION OF TAKING—Filed August 13, 1963

TO THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, Cyrus R. Vance Secretary of the Army of the United States, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), and the Act of Congress approved March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which acts authorize the acquisition of land for river and harbor and flood control purposes; the Act of Congress approved May 17, 1950 (Public Law 516, 81st Congress), which Act authorizes the construction of John Day Lock and Dam; and the Act of Congress approved October 24, 1962 (Public Law 87-880), which act appropriated funds for such purposes.

[fol. 11] (b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the construction of a project for

the improvement of navigation, for flood control and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with establishment of John Day Lock and Dam and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estate taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Cyrus R. Vance Secretary of the Army, this 12th day of July, A. D. 1963, in the City of Washington District of Columbia.

/s/ Cyrus R. Vance
Secretary of the Army

[fol. 12]

SCHEDULE "A" TO DECLARATION OF TAKING

The land which is the subject matter of this declaration of taking aggregates 341.47 acres of land, more or less, situate and being in the Counties of Morrow, Gilliam, Sherman and Umatilla, State of Oregon. A description of the land being taken, together with the names of the purported owners thereof, and a statement of the sum estimated to be just compensation therefor, is as follows:

TRACT 1617-1

All that portion of the northeast quarter of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Gilliam County, State of Oregon, which lies northeasterly of the center of the main channel of the John Day River.

The tract of land above described contains 10.16 acres, more or less, of which 4.18 acres lie below the ordinary high water line and within the John Day River.

Names of Purported Owners: See Tract 1617-2

TRACT 1617-2

All that portion of the southeast quarter of Section 4, Township 2 North, Range 18 East of the Willamette Meridian, Sherman County, State of Oregon, which lies southwesterly of the center of the main channel of the John Day River and northeasterly of a traverse line described as follows:

Beginning at a point lying northerly of the east-west center line of said Section 4, which point lies North 66° 18′ 56″ West, a distance of 2316.32 feet from the quarter section corner lying on the east line of said Section 4; thence South 30° 29′ 36″ East, a distance of 3133.38 feet; thence South 51° 32′ 31″ East, a distance of 1200.00 feet to a point lying easterly of the east line of said Section 4, which point lies North 53° 00′ 31″ East, a distance of 322.34 feet from the southeast corner of said Section 4, and

said point being the point of terminus of the above described traverse line.

The tract of land above described contains 41.60 acres, more or less, of which 6.89 acres lie below the ordinary high water line and within the John Day River.

Names of Purported Owners of Tracts 1617-1 and 1617-2:	1. James Fox, and Emma Fox, his wife 2. George L. Fox and Lucile H. Fox, his wife
Addresses of Purported Owners:	1. Corbett, Oregon 2. Rufus, Oregon
Estimated Just Compensation for Tracts 1617-1 and 1617-2:	TWO THOUSAND NINE HUNDRED AND NO/100-DOLLARS ($2,900.00)

[fol. 13] TRACT 2164

All that portion of the West half of the East half of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of the southwest quarter of the northeast quarter of said Section 28, said point being 2,129 feet West of the quarter corner between Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45″ East, a distance of 620.40 feet;

thence North 48° 15′ West, a distance of 351.12 feet;

thence South 39° 45′ East, a distance of 620.40 feet, to the point of beginning.

There is excepted therefrom all that portion lying northeasterly of the southwesterly right of way line of the existing John Day Highway.

There is also excepted all that portion lying within the existing right of way of the Oregon-Washington

Railroad and Navigation Company, Condon Branch Line.

The tract of land above described contains 1.00 acres, more or less.

Names of Purported Owners: 1. A. H. Harding and Esther E. Harding, his wife.

Address of Purported Owners: 1. Route 2, Box 259C, Troutdale, Oregon

Estimated Just Compensation: ONE THOUSAND ONE HUNDRED AND NO/100 DOLLARS ($1,100.00)

TRACT 2165-1

All that portion of the southwest quarter of the northeast quarter of Section 28, Township 3 North, Range 21 East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Beginning at a point on the south line of said southwest quarter of the northeast quarter, said point being 2,129 feet west of the quarter corner between Sections 27 and 28;

thence North 32° 00′ East to the southwesterly right of way line of the John Day Highway;

thence southeasterly along said highway right of way, to a point on a line bearing North 39° 45′ East from the point of beginning;

[fol. 14] thence South 39° 45′ West to the point of beginning.

There is excepted therefrom all that portion lying within the existing right of way of the Oregon-Washington Railroad and Navigation Company, Condon Branch line.

The tract of land above described contains 0.05 of an acre, more or less.

Names of Purported Owners: See Tract 2165-2

TRACT 2165-2

All that portion of the northwest quarter of the southwest quarter of Section 28, Township 3 North, Range 21

East of the Willamette Meridian, Gilliam County, Oregon, being more particularly described as follows:

Commencing at a point on the North line of said northwest quarter of the southeast quarter, said point being West 2,129 feet from the quarter corner common to Sections 27 and 28;

thence South 48° 15′ East, a distance of 351.12 feet;

thence North 39° 45′ East to the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch) and the TRUE POINT OF BEGINNING:

thence continuing North 39° 45′ East to the southerly right of way line of the John Day Highway;

thence southeasterly along said highway right of way to the point of intersection of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company (Condon Branch);

thence northwesterly along said northerly railroad right of way line to the point of beginning.

The tract of land above described contains 0.14 of an acre, more or less.

Name of Purported Owner of Tracts 2165-1 and 2165-2:	**George Shane, Jr.**
Address of Purported Owner:	**Arlington, Oregon**
Estimated Just Compensation for Tracts 2165-1 and 2165-2:	**ONE HUNDRED AND NO/100 DOLLARS ($100.00)**

TRACT 2403

Government Lots 1, 2, 3 and 4, in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

Names of Purported Owners: **See Tract 2514**

[fol. 15] TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

Names of Purported Owners of Tracts 2403 and 2514:	1. R. B. Rands, and Josephine Rands, his wife 2. Ferdinand Emberger 3. Northern Pacific Railway Company 4. State of Oregon
Addresses of Purported Owners:	1. Boardman, Oregon 2. Unknown 3. 1008 Smith Tower, Seattle 4, Washington 4. State Capitol Bldg. Salem, 10, Oregon
Estimated Just Compensation for Tracts 2403 and 2514:	SEVEN THOUSAND EIGHT HUNDRED AND NO/100 DOLLARS ($7,800.00)

TRACT 2528

A strip of land 200 feet in width, being 100 feet wide on each side of the center lime of the existing main track of the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across Government Lots 1, 2, 3 and 4 of Section 10, Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon, containing 25.20 acres, more or less.

Names of Purported Owners:	1. Fannie Slevin 2. Ferdinand Emberger
Addresses of Purported Owners:	1. #6 Ashfield Park Teremure, Dublin 6, Ireland 2. Unknown
Estimated Just Compensation:	ONE HUNDRED EIGHTY AND NO/100 DOLLARS, ($180.00)

TRACT 3300

All that portion of the west 542 feet of the south half of the southwest quarter of Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the northerly right of way line of the Oregon-Washington Railroad and Navigation Company containing 8.26 acres, more or less.

[fol. 16]

Names of Purported Owners:	1. Clyde Hoyt and Nellie Hoyt as tenants in common 2. James F. McMillin and Madeline McMillin, his wife, contract purchasers
Addresses of Purported Owners:	1. Route 2, Box 81, Umatilla, Ore 2. Route 2, Umatilla, Ore
Estimated Just Compensation:	ONE HUNDRED TWENTY FIVE AND NO/100 DOLLARS ($125.00).

TRACT 3305

All that portion of the east 400 feet of Government Lot 2, Section 14, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of a line described as follows:

Beginning at a point on the east line of said Section 14, said point lying north, a distance of 1700 feet from the southeast corner thereof;

thence South 80° 05′ West to a point on the south line of said Lot 2 and point of terminus of the above described line.

The tract of land above described contains 5.04 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

Names of Purported Owners:	1. Clyde Hoyt and Nellie Hoyt, tenants in common 2. Robert Hoyt and Thula Hoyt, husband and wife, contract purchasers
Addresses of Purported Owners:	1. Rte 2, Umatilla, Oregon 2. Baxter Road, Hermiston, Oregon
Estimated Just Compensation:	ONE HUNDRED SIXTY AND NO/100 DOLLARS ($160.00)

TRACT 3313

The east 359.23 feet of the west 718.46 feet of Government Lot 4 in Section 13, Township 5 North, Range 27 East of the Willamette Meridian, Umatilla County, Oregon, lying northerly of the following described line:

Beginning at a point on the west line of said Section 13, said point lying north a distance of 1700 feet from the southwest corner thereof;

thence North 80° 05′ East, a distance of 800 feet to the point of terminus of the above described line.

The tract of land above described contains 7.02 acres, more or less.

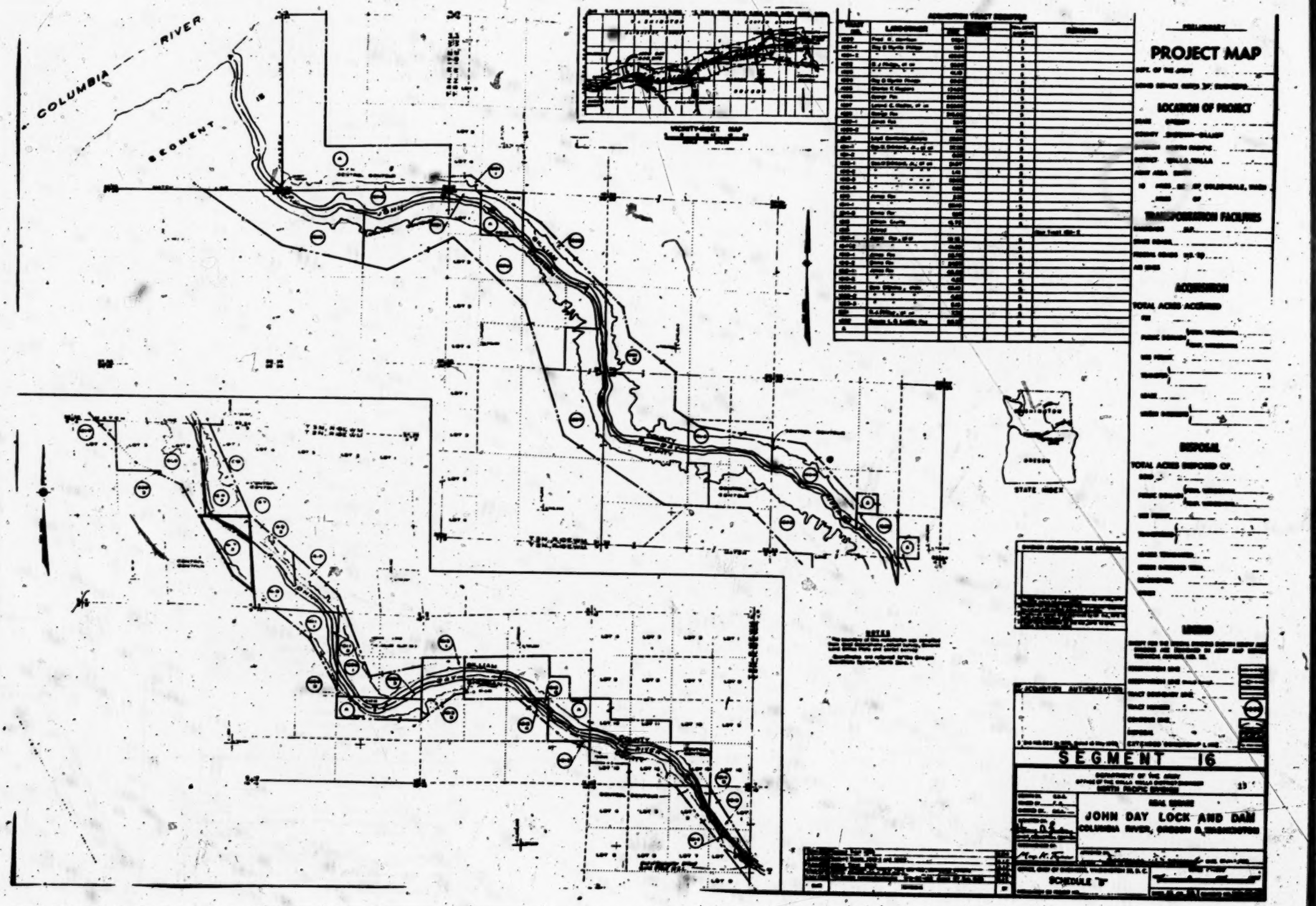
NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

[fol. 17]

Names of Purported Owners:	1. Marvin Simmons and Norma J. Simmons, his wife 2. Northern Pacific Railway Company
Addresses of Purported Owners:	1. Umatilla, Oregon 2. 1008 Smith Tower, Seattle Washington
Estimated Just Compensation:	THREE THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($3,300.00).

The gross sum estimated to be just compensation for the land hereby taken is FIFTEEN THOUSAND SIX HUNDRED SIXTY FIVE AND NO/100 DOLLARS ($15,665.00).

[fol. 18]

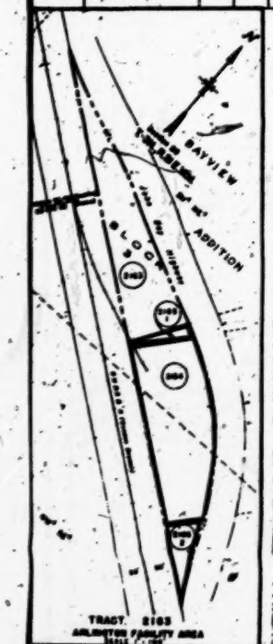

COLUMBIA RIVER
SEGMENT 16
PROJECT MAP
LOCATION OF PROJECT
TRANSPORTATION FACILITIES
ACQUISITION
DISPOSAL
REMARKS
STATE INDEX
SEGMENT 16
JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
SCHEDULE 'B'

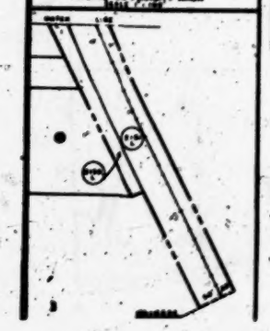
[fol. 19]

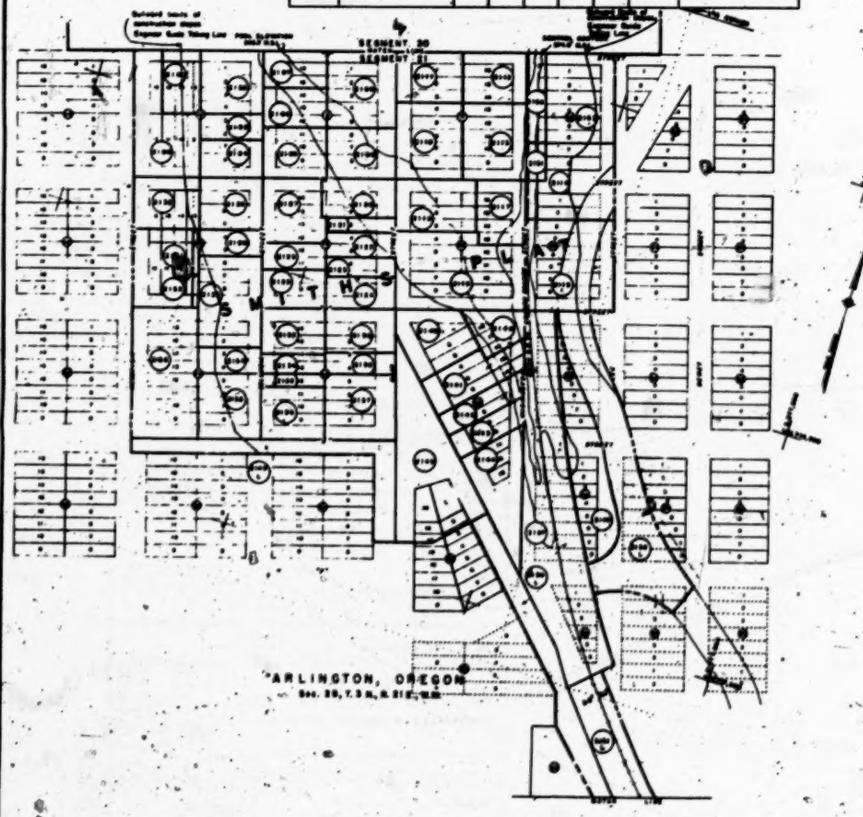
ACQUISITION TRACT REGISTER

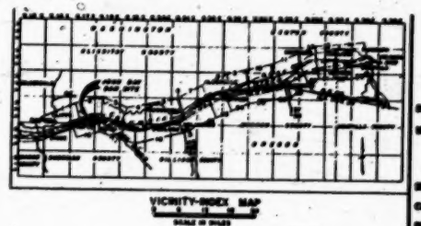
TRACT NO.	LAND OWNER	ACREAGE FEE	ACREAGE EASEMENT	REAL ESTATE AGENT	REMARKS
2100	Burton Shellenberger	0.55			
2101	O.S. Stewart	0.01			
2102	Ethel Davidson	0.04			
2103	Joseph H. Utz	0.10			
2104	Kenneth and Elizabeth Wilson	0.01			
2105	Robert S. Gish	0.09			
2106	Louis A. Hoffstadt	0.01			
2107	Andrew Davidson et ux	0.01			
2108	Golden Water Co.	0.40			
2109	Pacific Tel. and Tel. Co.	0.31			
2110	Methodist Church	0.31			
2111	Trimble Oil Co.	0.46			
2112	John Van Winkle	0.20			
2113	The Texas Co.	0.42			
2114	[illegible]	0.03			
2115	Gilliam County	0.79			Combined With Tract 2041
2116	DELETED			Combined With Tract 2041	
2117	Orpha O. Gibson	0.06			
2118	Henry H. Grohs	0.37			
2119	A.S. Waugh	0.04			
2120	Kenneth and Elizabeth Wilson	0.05			
2121	Golden Water Co.	0.10			
2122	A.F. and A.G. Co. 00	0.10			
2123	Pioneer Orange Grove	0.10			
2124	Laura C. Gish	0.09			
2125	[illegible]	0.01			
2126	Ora E. Hunt	0.10			
2127	Robert E. Gordon	0.34			

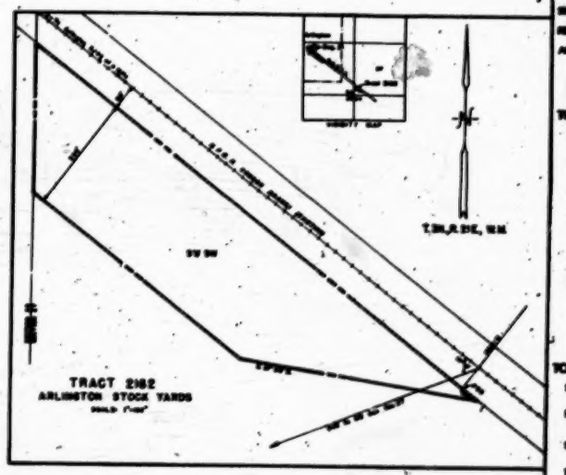
TRACT NO.	LAND OWNER	FEE	ACREAGE EASEMENT	REAL ESTATE AGENT	REMARKS
2128	S.L. Hargraves	0.29			
2129	Willard T. Ellis	0.14			
2130	[illegible]	0.46			
2131	[illegible]	0.06			
2132	Marion Elv Smith	0.30			
2133	John W. Roberts	0.24			
2134	W.J. Fyrup	0.11			
2135	Kenneth and Elizabeth Wilson	0.07			
2136	Foster A. Gass	0.20			
2137	S.L. Lemon	0.60			
2138	William Marshall	0.12			
2139	Alvin A. Weir	0.36			
2140	Lillian Hartigan	0.20			
2141	Methodist Church	0.31			
2142	Elmer L. Bailey	0.20			
2143	Goldie B. Fleischauer	0.10			
2144	George Eldred jr.	0.42			
2145	DELETED				
2146	Lewis E. Gibson	0.19			
2147	Tidewater Oil Co.	0.44			
2148	Leslie E. Gaunt	0.20			
2149L	City of Arlington		No Area		
2150L	[illegible]		No Area		
2151	O.W.R.R. Co.	0.07			
2152	[illegible]	0.04			
2153	Goldie B. Gibbons	0.54			
2154	William A. Bell	0.26			
2155	Harry Brewer	0.27			
2156	Ella G. Gaunt	0.70			
2157	O.W.R.R. Co.	1.50			
2158L	State of Oregon		No Area		
2159	DELETED				Combined With Tract 2147
2160	DELETED				
2161L	O.W.R.R. Co.		No Area		
2162	Arlington Saddle Club Inc.	4.27			
2163	Lillie Tatum	0.04			
2164	A.A. Hardies	1.00			
2165-1	Gertie Stone A.	0.20			
2165-2	" "	0.14			
2166	Goldie B. Gibbons	0.26			











NOTES

PROJECT MAP

LOCATION OF PROJECT

TRANSPORTATION FACILITIES

ACQUISITION

TOTAL ACRES ACQUIRED

DISPOSAL

TOTAL ACRES DISPOSED OF

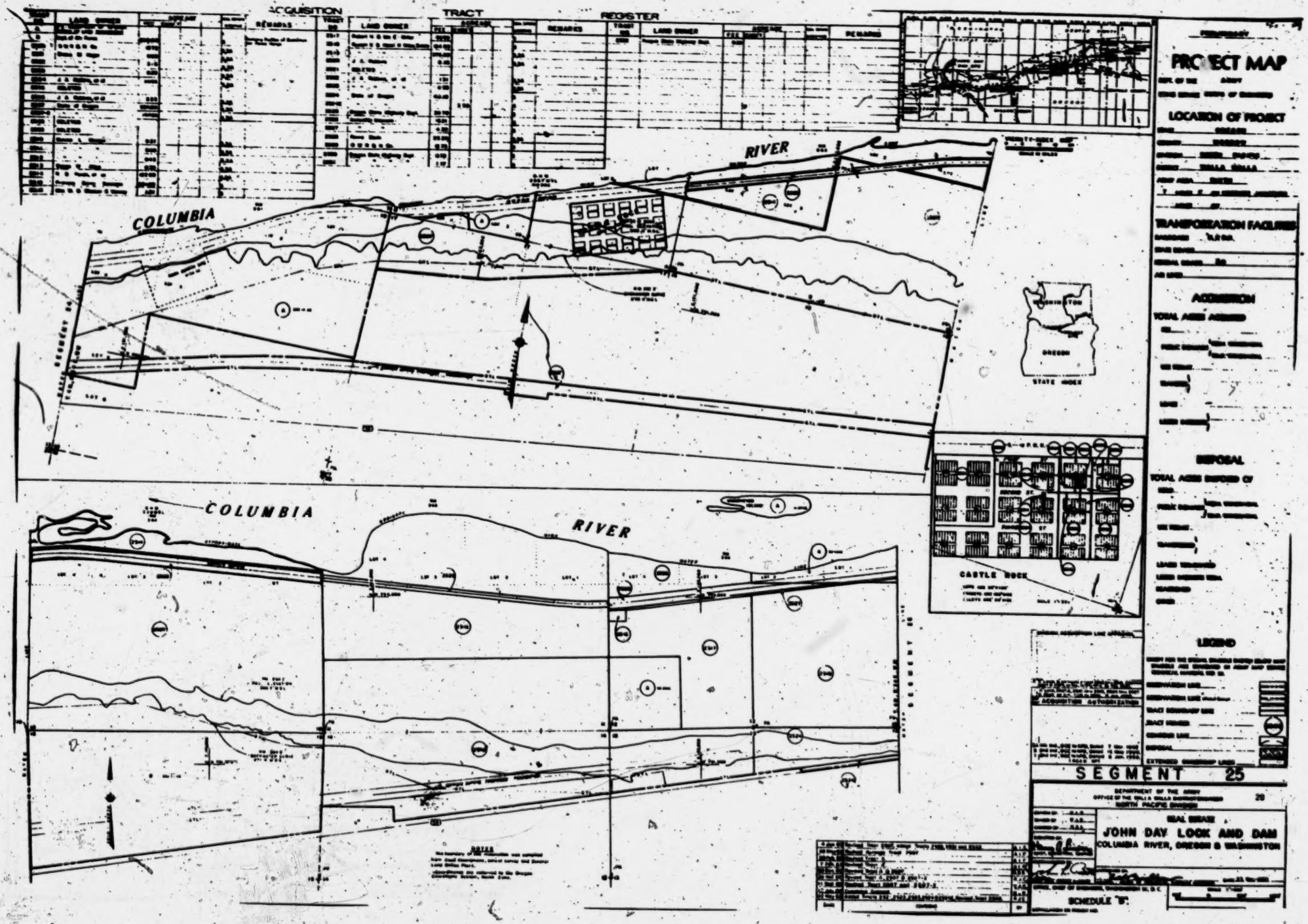
LEGEND

SEGMENT 21

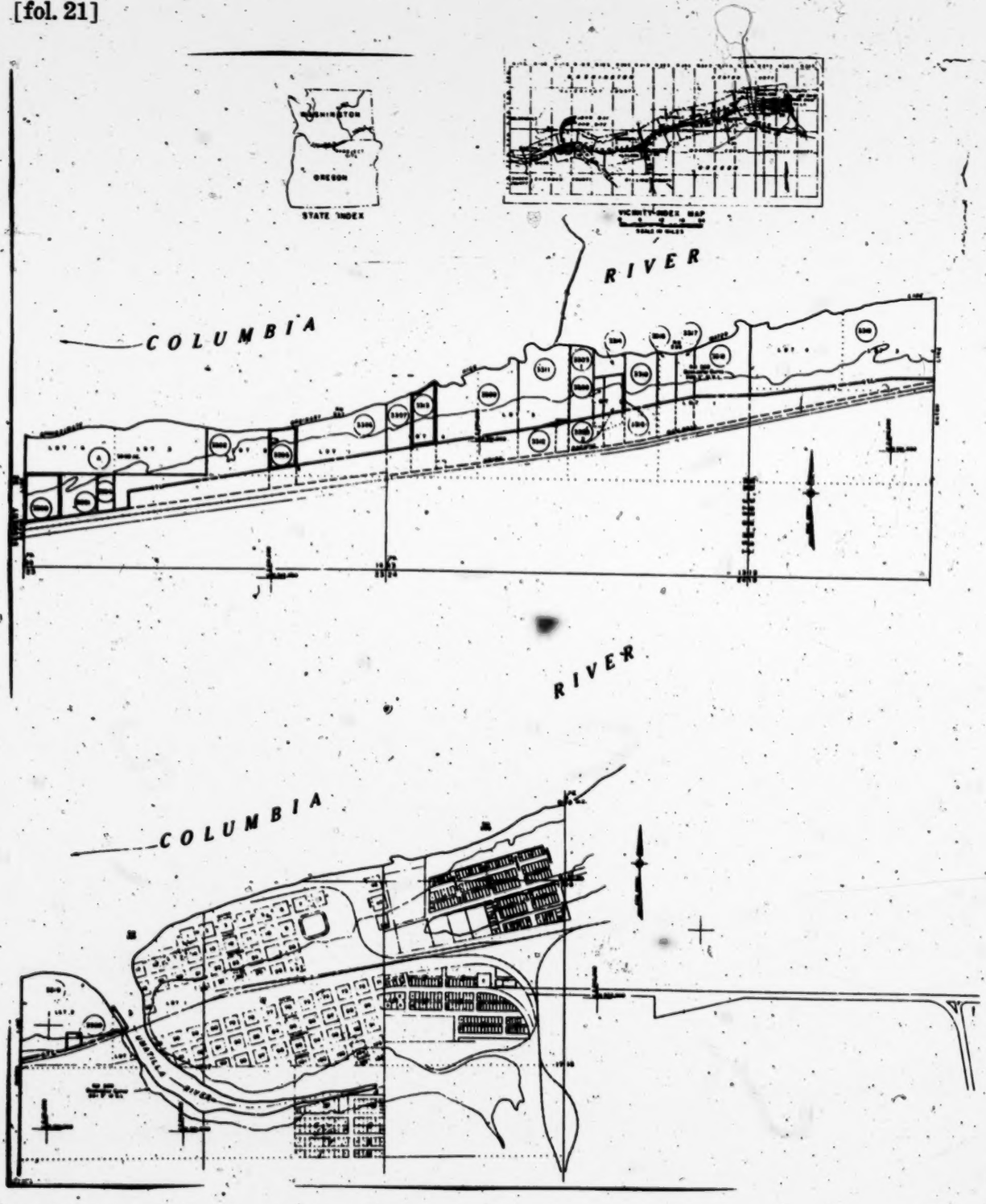
REAL ESTATE

JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
CITY OF ARLINGTON

SCHEDULE "B"


ACQUISITION
TRACT
REGISTER
LAND OWNER
REMARKS
PROJECT MAP
LOCATION OF PROJECT
TRANSPORTATION FACILITIES
ACQUISITION
DISPOSAL
LEGEND
COLUMBIA
RIVER
COLUMBIA
RIVER
OREGON
STATE INDEX
CASTLE ROCK
SEGMENT 25
REAL ESTATE
JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON
SCHEDULE "B"

[fol. 21]



ACQUISITION TRACT REGISTER

TRACT NO.	LAND OWNER	ACREAGE	REMARKS
3340		0.39	
3341		7.27	
3342		10.42	
3342-1		0.84	
3342-2		3.47	
3343		3.84	
3344		5.84	
3345		43.80	
3347		3.87	
3348		1.80	
3350		27.10	
3351		0.10	
3311		10.34	
3312		0.20	
3313		7.00	
3314		0.04	
3315		0.01	
3316		4.00	
3317		0.40	
3318		1.40	
3319		10.10	
3320		1.00	

PRELIMINARY

PROJECT MAP

DEPT. OF THE ARMY

CORPS OF ENGINEERS

LOCATION OF PROJECT

STATE OREGON

COUNTY UMATILLA

DIVISION NORTH PACIFIC

DISTRICT WALLA WALLA

ARMY AREA (WITH)

3 MILES SW OF UMATILLA

CITY OF UMATILLA

TRANSPORTATION FACILITIES

RAILROADS N.P.

STATE ROADS

FEDERAL ROADS T30

AIR BASE

ACQUISITION

TOTAL ACRES ACQUIRED

FEE

PUBLIC DOMAIN (FEDERAL WITHDRAWAL, STATE WITHDRAWAL)

USE PERMIT

TRANSFER

OTHER

OTHER WITHDRAWALS

DISPOSAL

TOTAL ACRES DISPOSED OF

SALE

PUBLIC DOMAIN (FEDERAL WITHDRAWAL, STATE WITHDRAWAL)

USE PERMIT

TRANSFERRED

OTHER TRANSFERS

OTHER WITHDRAWALS TOTAL

EASEMENTS

OTHER

LEGEND

EXCEPT FOR THE SPECIAL CONDITIONS SHOWN HEREON AND DESCRIBED IN ARMY MAP SERIES TECHNICAL REPORT NO. 33,

RESERVATION LINE

RESERVATION LINE (MAP LINE)

TRACT DESIGNATION LINE

TRACT NUMBER

CONDEMN LINE

DISPOSAL

EXTENDED OWNERSHIP LINE

SEGMENT 33

DEPARTMENT OF THE ARMY
OFFICE OF THE WALLA WALLA DISTRICT ENGINEER
NORTH PACIFIC DIVISION

21

REAL ESTATE

JOHN DAY LOCK AND DAM
COLUMBIA RIVER, OREGON & WASHINGTON

SCHEDULE "B"

[fol. 22]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

JUDGMENT ON THE DECLARATION OF TAKING AND ORDER OF IMMEDIATE POSSESSION—August 14, 1963

[fol. 23] This cause coming before the Court on motion of plaintiff, and the Court having considered the record and the representations made in this case and being fully advised, FINDS; that these proceedings have been con-

ducted according to law and that this Court has jurisdiction of the parties and the subject matter of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines, in and to the land more particularly described in Exhibit "A" annexed hereto, became vested in plaintiff on the 13th day of August, 1963, the date of the filing of the Declaration of Taking and of payment into Court of the estimated just compensation, and that on said date the right to receive just compensation vested in the persons entitled thereto.

IT IS FURTHER ORDERED that possession of Tracts Nos. 2164, 2165-1, 2165-2, 2403, 2514 and 2528 is awarded to plaintiff as of the 14th day of August, 1963.

IT IS FURTHER ORDERED that possession of Tracts Nos. 1617-1, 1617-2, 3300, 3305 and 3313 is awarded to plaintiff as of January 1, 1964.

ENTERED this 14th day of August, 1963.

/s/ William G. East
Judge

PRESENTED BY:

/s/ Joseph E. Buley
JOSEPH E. BULEY
Assistant United States Attorney

[fol. 24]

[CLERK'S NOTE: Exhibit "A"—Description of Tracts of land is omitted from the record here as it appears on pages 4-7 supra.]

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEARANCE—Filed September 3, 1963

[fol. 29] COMES NOW R. B. RANDS and JOSEPHINE RANDS, husband and wife, by their attorneys, Mahoney & Abrams, and state that they claim an interest as the owners of the property described as Tracts 2403 and 2514 in the complaint filed in the above captioned case, as follows:

TRACT 2403

Government Lots 1, 2, 3 and 4 in Section 13, Township 4 North, Range 23 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted therefrom all that portion lying within the existing operating right of way of the Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 121.00 acres, more or less.

TRACT 2514

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all

of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 122.00 acres, more or less.

The interest claimed is in the nature of a full interest in the property above described subject to reservations of record as to the West Extension Irrigation District, Northern Pacific Railway Company and the State of Oregon.

WHEREFORE, defendants demand that they be considered a defendant in the matter and receive notice of all proceedings affecting said property.

MAHONEY & ABRAMS

/s/ By Robert B. Abrams
Mahoney & Abrams
Attorneys at Law
P. O. Box 428
Heppner, Oregon

[fol. 30] DATED August 28, 1963.

Trial by jury of the issue of just compensation is demanded.

MAHONEY & ABRAMS

By /s/ Robert B. Abrams
of Attorneys for R. B. Rands
and Josephine Rands

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

MOTION TO AMEND NOTICE OF APPEARANCE—
Filed September 27, 1963

COME NOW the defendants R. B. Rands and Josephine Rands and move this Honorable Court for its Order permitting them to Amend their Notice of Appearance heretofore filed in this cause by denominating same as an "Answer" and by alleging defenses and objections to the taking of their property.

DATED: This 26th day of September, 1963.

MAHONEY & ABRAMS

By: /s/ Robert B. Abrams alp
DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Counsel for Defendants

In support of this Motion, defendants rely upon the affidavit attached hereto, FRCP 6(b) and 60(b), and decisions relating thereto.

[fol. 32] ATTACHMENT TO MOTION

STATE OF OREGON)
) ss:
County of Multnomah)

I, Alex L. Parks, being first duly sworn upon oath depose and say:

That defendants herein, after being served with the Notice filed by plaintiff UNITED STATES OF AMERICA pursuant to Rule 71A, sought counsel of Mahoney & Abrams, Heppner, Oregon. Upon investigation it appeared to the said Mahoney & Abrams at that time that no grounds existed for objecting to the taking of defendants' property and they, therefore, filed the usual Notice of Appearance which, under Rule 71A, simply permits the defendants to contest the amount of compensation to be paid.

Subsequent to the filing of the said Notice of Appearance, Mahoney & Abrams contacted your affiant with the request that he assist them as co-counsel. Due to circumstances beyond the control of either your affiant or Mahoney & Abrams, counsel were not able to confer and conduct a joint analysis of the matter until after the 20 days mentioned in Rule 71A had expired.

Until such conference and analysis, it was not apparent to either your affiant or Mahoney & Abrams that probable grounds existed upon which defendants could contest the actual taking by condemnation. To the extent to which time has permitted counsel to explore such possibility, it now appears due to the peculiar circumstances involved (the property is located in the area which the State of Oregon is developing as the so-called "Boardman Space Age Park" for lease to Boeing Aircraft; said property probably will be required to be used for the development of port facilities for said space age park; and your affiant is informed that an agreement has been entered into between the United States and the State of Oregon whereby the United States is or will be required to declare said property "surplus" to its needs for flood control and navigation and thereafter transfer over the same to the State of Oregon) that the plaintiff United States lacks jurisdic-

tion for the taking and that the cognizant agency of the United States responsible for initiating the taking has acted arbitrarily, capriciously and without authority in seeking to condemn said property for the purposes to which it proposes to put the same.

Rule 71A permits only two responses to the Complaint [fol. 33] in Condemnation; i.e., a Notice of Appearance—in which only value can be contested; and an Answer—in which condemnee can assert defenses and objections to the taking. Thus, defendants can only assert its defense that the plaintiff lacks authority to condemn (and its corollary that the court lacks jurisdiction) in a pleading denominated as an "Answer" which expressly sets up such defense. Defendants are thus precluded from litigating the lack of jurisdiction unless they are permitted to amend the Notice of Appearance and assert such defense.

Allowing defendants to amend their Notice of Appearance can not and will prejudice the position of plaintiff United States. The trial of this matter, in normal course of events, will not be held until the Spring of 1964. Defendants were served with the Complaint in Condemnation on August 19th, 1963, and less than 39 days have elapsed since defendants first received notice of the pendency of the suit.

Unless defendants are thus permitted to amend their Notice of Appearance to denominate the same as an "Answer" and thereby assert defenses and objections to the taking, their position will be irreparably prejudiced and the condemnation suit could proceed to judgment without the jurisdictional issue having been decided and litigated in an adversary fashion.

Your affiant, therefore, respectfully asks that defendants be permitted to amend their Notice of Appearance, as aforesaid, upon the grounds of excusable neglect as permitted by FRCP 6(b) and 60(b).

/s/ Alex L. Parks

SUBSCRIBED and sworn to before me this 27th day of September, 1963.

/s/ Carol J. Wirtz
Notary Public for Oregon
My Commission Expires: 7-22-67

[fol. 34] Due service of the within Motion & Affidavit is hereby accepted in Multnomah County, Oregon, this 27th day of September, 1963, by receiving a copy thereof, duly certified to as such by Alex L. Parks, of Attorneys for Defendants Rands.

/s/ Joseph E. Buley
Of Attorneys for Plaintiff
United States of America

[fol. 35]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

. . . R. B. RANDS and JOSEPHINE RANDS, Husband and Wife, . . ., DEFENDANTS

OPINION AND ORDER—October 16, 1963

This is a condemnation proceeding. The cause is before the Court on the motion of the defendants Rands, for permission to file an answer setting up a defense challenging the right of the United States to condemn defendants' property.

The record discloses that defendants were served with complaint in this cause on August 13, 1963. A declaration of taking [1] was filed herein on August 13, 1963. On September 3, 1963, the Rands' filed a petition for an 80% distribution of the amount of just compensation placed

[1] 40 U.S.C. § 258a.

on deposit and on the same day filed a notice of appearance, which did not in any way indicate that a question would later be raised as to the right to condemn.

The motion was not filed within the twenty day period mentioned in Rule 71A (e). The plaintiff relied on the appearance filed by said defendants and, thereafter, and before the filing of the motion, conveyed a portion of the [fol. 36] property, the title to which was acquired by the declaration, to the State of Oregon.

It is my opinion that Rule 71A (e) requiring landowners to present all defenses or objections to the taking within twenty days from the date of service of process, is absolute and that the Court, on that particular feature, has no jurisdiction to extend time in which to raise such defenses.

Significant is the fact that the language of the rule with reference to the service of the notice of appearance is permissive . . . "*he may serve* a notice of appearance . . .", while the language with reference to the service of an answer, in raising a defense, is mandatory, . . . "if a defendant has any objection or defense to the taking of his property, *he shall serve his answer* within twenty days . . .". Manifestly, the Congress by using different terminology must have intended a different result.

The use of the word "shall" in the statute, although not entirely controlling, is of significant importance, and, indicates an intention that the statute should be construed as mandatory. *Escoe* v. *Zerbst*, 295 U.S. 490; *West Wisconsin Railway Co.* v. *Foley*, 94 U.S. 100; *Pittman Construction Co., Inc.* v. *Housing Authority of Opelousas*, 167 F. Supp. 517, affirmed 264 F.2d 695. Recognizing, as I do, that the word "shall" should be construed permissively as meaning "may" where the Congress so intended, *Ballou* v. *Kemp*, 92 F.2d 556, I find nothing in the language before me which would indicate such an intention.

The language employed in connection with requiring a defendant to raise his defense within twenty days, from service, is similar to, if not identical with, the language used in Rule 59(b) with reference to the time limit within which to file a motion for a new trial. ". . . A motion for

[fol. 37] a new trial *shall be served* not later than ten days after the entry of the judgment. . . ." In construing this subdivision of Rule 59, the Courts have uniformly held that the language is mandatory and that a Judge has no power or authority to act after the time has expired. *Hulson, et al,* v. *Atchinson, Topeka and Santa Fe Railway Co.,* 27 F.R.D. 280, 289 F.2d 726 (7 Cir. 1961), cert. den. 368 U.S. 835.

It is my belief that neither Rule 6(b) nor Rule 60(b), apply to this particular problem. Assuming, however, that such rules apply, *United States* v. *1108 acres of land, etc.* 25 F.R.D. 205, I find that the showing made in support of this motion is insufficient to grant defendants relief under such rules. Furthermore, if I have discretion, I would exercise that discretion against the allowance of the motion for the reason that the defendants made no attempt to raise the question until after a substanial portion of the property had been transferred to the State of Oregon.

The language of the rule is clear and concise. The progress of events in this case demonstrates the absolute necessity of adhering to the specific requirement that these defenses be raised within the twenty day period. Otherwise, the Government would be led into believing that no such defenses would be presented and, as often occurs, make some disposition of a part, which it believes to be in excess, to some other Governmental agency.

The motion should be denied.

IT IS SO ORDERED.

DATED this 16th day of October, 1963.

/s/ John F. Kilkenny
District Judge

[fol. 38]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES FOX, ET AL, DEFENDANTS

MEMORANDUM OPINION—October 12, 1964

Presented for decision in advance of the trial is the very narrow question of whether just compensation, required to be paid by the United States by reason of the Fifth Amendment, includes the value of defendants' land as a port site for future development. Defendants' lands border the high water mark of the Columbia River for a considerable distance, and, for the purposes of this opinion, it is conceded that at least one site could be utilized as a port.

I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. It is my belief that the value, if any, for port purposes is subject to the overriding navigational services of the United States, [fol. 39] which permits the appropriation of any such a property right by the United States without compensation. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 (1960).

Careful study has been given to the resourceful arguments of the defendants. Although confusion exists in the reasons given for the different United States Supreme

Court cases, and in some respects they cannot be reconciled, I believe the underlying principles announced in the decisions would preclude an award for value that might be attributed to a port site on this great navigational stream.

DATED this 12th day of October, 1964.

/s/ John F. Kilkenny
District Judge

[fol. 40]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

R. B. RANDS and JOSEPHINE RANDS,
husband and wife, DEFENDANTS

PRETRIAL ORDER TRACT No. 2514—April 5, 1965

This case having come on for pretrial before the Honorable John F. Kilkenny, one of the Judges of the above-entitled Court, on the ..... day of ....., 1965, plaintiff appearing by and through Joseph E. Buley, Assistant United States Attorney, and defendants R. B. Rands and Josephine Rands, husband and wife, appearing by and through Alex Parks, of their attorneys, whereupon the parties did confer and agree upon the following, subject to the approval of the Court.

I

STATEMENT OF JURISDICTION NATURE OF PROCEEDINGS

The jurisdiction of the Court is founded on Title 28, Section 135(a), U.S.C. This is a condemnation case filed on behalf of the Corps of Engineers, an agency of the United States of America, to acquire Tract 2514 for the John Day Lock and Dam Project.

II

AGREED FACTS

A Declaration of Taking was filed on August 13, 1963, [fol. 41] and that date is the date of taking. The interest being acquired is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines. A description of the land taken is set forth in Exhibit "A" attached hereto and hereby made a part hereof. There are 139.00 acres being acquired. The property is owned by R. B. Rands and Josephine Rands, husband and wife.

III

PLAINTIFF'S CONTENTIONS

Plaintiff makes the following contentions:

1. The highest and best use of the property is for agricultural use.
2. Comparable transactions upon which plaintiff relies are listed and attached hereto, marked Exhibit "B".
3. The defendants are entitled to no enhancement of value for a port site use dependent upon riparian location upon the Columbia River which is a navigable stream.
4. The defendants are entitled to no enhancement of value because of the announcement and construction of the John Day Lock and Dam Project.
5. The defendants have no compensable interest in any property located below the normal high water line of the Columbia River.

IV

DEFENDANTS' CONTENTIONS

Defendants make the following contentions:

1. The highest and best use of the property designated as Tract No. 2514 is as follows:

(a) With respect to government lots 1, 2, 3 and 4, Section 10, Township 4 North, Range 24 East, Willamette Meridian, Sand and gravel;

(b) With respect to government lots 1 and 2, Section 8, Township 4 North, Range 24 East, Willamette Meridian, port site;

(c) With respect to the remainder of Tract No. 2514, irrigable and grazing lands.

2. Comparable transactions upon which defendant relies are listed and attached hereto marked Exhibit "C".

[fol. 42] 3. The landowners are entitled to the value of a port site on the property.

4. The government does not have the right to take nor is a public purpose served by the acquisition of the entire site, and defendants should have been allowed to amend their notice of appearance to raise such issues.

V

ISSUE OF FACT

The issue of fact to be decided by the jury is the value of the property.

VI

ISSUES DETERMINED BY THE COURT IN ADVANCE OF TRIAL

The Court has previously ruled that the defendants cannot amend their notice of appearance to question the authority of the government to acquire this property. The Court further held that no sufficient showing was made in any event to deny the government's authority to acquire the property. The defendants are granted an excep-

tion thereto. The defendants desire to make an additional offer of proof in regard thereto.

The Court has previously held that the defendants are entitled to no increment of value because of an alleged port site. The Court granted an exception to its ruling and has agreed that a limited offer of proof in regard thereto may be made.

VII

ISSUE OF LAW

The only issue of law (exclusive of those appearing under paragraph VI) to be determined by the Court is judgment of just compensation based upon the jury verdict.

VIII

EXPERT WITNESSES

1. Plaintiff's expert witnesses are Elmer Kolberg, Leo R. Mayers, S.A. Ross and Larry McDevitt, as to tests of the sand and gravel.

2. Defendants' expert witnesses as to value of sand and gravel, and grazing lands are Harley McDowell, R. J. Deacon and/or Charles R. Lane, and H. G. Gosney; as to value of port site, Captain A. Leppaluoto, and Samuel Mallicoat.

[fol. 43]

IX

EXHIBITS

The following exhibits will be produced and marked and may be received in evidence or otherwise admissable without further identification or authentication. Except as hereafter noted each is what it purports to be:

Plaintiff's Exhibits:

1. An aerial photograph.
2. Map.
3. Vicinity and/or sales map.
4. Reserved for pictures.
5. Reserved.

Defendants' Exhibits:

1. Report on gravel deposit by Northwest Testing Laboratories.
2. Aerial Photographs.
3. Maps showing in detail.
4. Deed, Federal Government to State of Oregon relative to Boardman Project.
5. Maps of gravel bar in prior years, including surveyor's notes.
6. Report of selection of site for the relocation of Boardman, Oregon: Cornell, Howland, Hayes and Merrifield, July, 1962.
7. Relocation of Boardman, Oregon, Bureau of Municipal Research and Service, June, 1962.
8. Reserved for stipulation, re: offer of proof on port site value.
9. Reserved.

X

EXPERT TESTIMONY

The Court has limited each party to three experts to testify as to the value of the property. The landowner is not included for the purpose of contruing this limitation, nor are experts called for limited offers of proof under paragraph VI.

XI

ORDER OF PRESENTATION

The defendant elects to proceed first in the presentation of the case.

[fol. 44]

XII

The foregoing constitutes the pretrial order in the above case; the pleadings shall pass out of the case insofar as the trial of the issue of just compensation is concerned,

and shall not be amended except by consent of the parties, or by order of the Court to prevene manifest injustices.

Dated this 5th day of April, 1965.

/s/ John F. Kilkenny
United States District Judge

The Foregoing Pretrial Order Is Approved:

DATE: March 31, 1965

/s/ Joseph E. Buley
Of Attorneys for Plaintiff

/s/ Alex Parks
Of Attorneys for Defendants

DATE: March 31, 1965

[fol. 45]

EXHIBIT "A" TO PRETRIAL ORDER

JOHN DAY LOCK AND DAM

COLUMBIA RIVER, OREGON AND WASHINGTON

R. B. Rands, et ux

Tract 2514
139.00 Acres

Description of Tract

All that portion of Government Lots 1, 2, 3 and 4, of Section 10, which lies north of a line lying parallel and northerly, a distance of 100 feet from the existing center line of the main line track of the railroad for the Oregon-Washington Railroad and Navigation Company as the same is located and constructed over and across said subdivisions, also all of Government Lots 1, 2, 3 and 4 of Section 9 and all of Government Lots 1 and 2 of Section 8, all in Township 4 North, Range 24 East of the Willamette Meridian, Morrow County, Oregon.

There is excepted from the above described tract of land all that portion lying within the existing railroad right of way of said Section 9 for the said Oregon-Washington Railroad and Navigation Company.

The tract of land above described contains 139.00 acres, more or less.

VHG 8 Jan 1962
Revised: VHG 3 Feb 1962
Revised: NJR 29 Jun 1962
Revised Acreage (Acq.): HAL 6 May 1964

[fol. 46]

Grantor: Paul Slaughter
Grantee: I. R. SULLIVAN
Date: 5/8/63
Recorded: Bk 69, page 186
Price: $1000
Desc NE¼ NE¼ Sec. 8, T 4N R 26E

Grantor: Jess Hansen
Grantee: Krebs Bros.
Date: 5/17/63
Recorded: Bk 44, page 240
Price: $15,000
Desc.: Portions of Section 26 and 35, T 3N R 22E

Grantor: Peter Campbell
Grantee: D. L. Lemon
Date: 4/2/63
Recorded: Volume E, page 227 (Miscellaneous Records)
Price: $36,000
Desc.: Portions of Sections 8, 9, 7, 17, 18, 19, 20 & 29, T 1N R 22E

Grantor: B. P. Doherty
Grantee: Lawrence Lindsay
Date: 12/16/63
Recorded: Misc. Volume 6, page 481
Price: $100,000
Desc.: Portions Section 25 and 36, T 2N R 25E and portions Sec. 1, 2 and 11, T 1N R 25E

Grantor: Mildred Halvorsen
Grantee: John W. Krebs
Date: 1/8/62
Recorded: Bk. 43, page 121
Price: $1600
Descr.: SW¼ Sec. 28, T 3N R 22E

Grantor: Fannie Slevin
Grantee: R. B. Rands
Date: 10/31/61
Price: $2500
Acreage: 52.4 acres, more or less
Desc.: All that portion of Section 10, T 4N R 24E lying north of the O.W.R. & N Co. right of way

[fol. 47]

Grantor: Fannie Slevin
Grantee: Don E. Hurrle
Date 11/15/61
Price: $7000
Acreage: 320 acres, more or less
Desc.: That part of the south half of Section 23, Township 4N R 24E lying south of the right of way of the main canal of the west extension of the Umatilla Project, and containing 315 acres. Also that part of the northwest quarter southeast quarter of Section 23, T 4N R 24E lying north of the canal and containing 5 acres, more or less

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

Pendleton, U. S. District Court, District of Oregon,
Filed Apr. 6, 1965, Keith Burns, Clerk,
By /s/ H. Jorgensen, Deputy, offer rejected

[Title Omitted]

STIPULATION RE OFFER OF PROOF—Filed April 6, 1965

The Court having previously ruled in the above entitled cause that defendants are not entitled to any enhancement to the value of a portion of their lands by reason of the use or potential use of the same as a port-site, but that defendants may sumbit a limited offer of proof in regard thereto for the purposes of appeal, it is hereby stipulated, subject to the approval of the Court, that the attached affidavits shall constitute such a limited offer of proof and that if the affiants were called as witnesses their testimony would be substantially as set forth in the said attached affidavits.

DATED: This 6th day of April, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Counsel for Defendants R. B. and Josephine Rands

SIDNEY LEZAK, United States Attorney

By: /s/ Joseph Buley
Assistant United States Attorney
Counsel for Plaintiff United States of America

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[Title Omitted]

AFFIDAVIT OF CAPT. A. LEPPALUOTO

STATE OF OREGON)
) ss
County of Multnomah)

CAPT. A. LEPPALUOTO, being first duly sworn deposes and says:

I am a licensed master of motor propelled vessels of under 4,000 tons, any ocean, any waters, having acquired such license by reason of experience on the Columbia River and its tributaries.

I first became involved in the water transportation industry when I was 17 years old, working aboard a small tug in Gray Harbor-Aberdeen, Washington.

In 1936, by then the owner of my own tugboat, the MYSTIC, I migrated to the Columbia River area. From 1936 to 1940 I did miscellaneous towing work on the middle and upper Columbia rivers but primarily operated drill barges doing contract work for the Corps of Engineers in making soundings of the Columbia River for navigation and dam purposes. This work was accomplished in the area of Bonneville Dam and between Celilo, Oregon and Umatilla, Oregon.

In the late 1930's the only main-stem dam on the [fol. 50] Columbia River was Bonneville Dam. Navigation above Bonneville Dam at that time had been confined to steamboats carrying small amounts of cargo. In 1938 I was hired by Tidewater Transportation Company to pilot a screw-type tugboat and barge up the Columbia to Umatilla, Oregon, at that time the head of navigation on the Columbia River. This was the first such movement on

the Columbia River. Subsequently, I was also employed to pilot the first tugboat of the Inland Navigation Company to push a petroleum barge as far upriver as Umatilla, Oregon.

By 1940, I had two tug companies of my own and at that time merged with the Inland Navigation Company and its affiliates. From 1940 until 1958 I was an officer, director, stockholder and General Manager of the Inland Navigation companies (numbering nine corporations and one partnership). At the time of my retirement in 1958, these companies owned and operated over 23 tugs and 40 barges, one of the tugs being the highest powered tugboat west of the Mississippi River and one of the barges being the largest barge ever operated on the Pacific Coast. The ICC operating rights of the companies extended from Mexico on the south to Alaska on the North and on the Columbia River from Astoria to Priest Rapids Dam and on the Snake River from its mouth to Hells Canyon, Idaho.

The principal commodities transported by the companies were wheat down the Columbia, petroleum up the Columbia and lumber and lumber products up and down the Pacific Coast. The companies owned or leased and operated terminals and port sites on the Columbia River at The Dalles, Oregon, Umatilla, Oregon, and Pasco, Washington, as well as serviced river grain elevators and terminals at such points as Arlington, Umatilla, The Dalles, Pasco, Rufus, Biggs Junction, etc.

From the inception of major barge transportation on the Columbia in the late 1930's I have had to be, and am, intimately informed about the availability of port sites on the Columbia River. This was absolutely necessary because port sites meant cargo and cargo was the life-blood of my companies. I have been intimately acquainted with the Boardman, Oregon area for almost 30 years, particularly the old port site at Castle Rock, Oregon.

[fol. 51] Historically, the Castle Rock landing was one of the earliest on the Columbia River. Sheep, wool, sacked grain and barrelled petroleum were loaded aboard sternwheelers at the Castle Rock landing before the turn of the century. The principal advantage of the landing then and now is the fact that deep water (at least 15 feet at

mean low water) exists right up against the shore and vessels could then and can now be put in at the landing at all stages of the water.

There is a grave shortage of available port sites on the Columbia River, a factor not generally understood or appreciated except by those who are in the water transportation business. The reason is really two-fold: (1) the Federal government has acquired fee title to practically all the shorelands on both sides of the Columbia River from Bonneville Dam upstream to the head of navigation. This came about because of the numerous dams which the Corps of Engineers has constructed and because the policy of the Corps has been to acquire fee title rather than flowage easements. (2) The river is paralleled within a hundred yards or so by the railroad tracks of the S.P.&S. Railway Company (in Washington) and the Union Pacific Railroad Company (in Oregon). The railroads understandably are jealous of their business and routinely refuse all requests for easements for roadways and pipelines over their tracks to the water's edge, knowing that such easements would make it possible for the water carriers to load and discharge cargo and thus compete with the railroads.

The only port-site acquisition that I know of by private owners on the Columbia River in the last 20 years was a long term (50 years) lease I secured for my companies from the United States near Biggs Junction, Oregon. This took place in 1957 or 1958, I do not now recall which. No drastic need then existed for the port site but I wanted to acquire it for the future because I had first hand knowledge of the difficulty of acquiring port sites which were not already owned by the Federal government and hedged in by railroad tracks.

The port-site at Castle Rock is extremely valuable because of these foregoing factors and because a public road [fol. 52] already crosses the Union Pacific main line track directly to the port site area. Furthermore, without the availability to the water, it is my understanding that the Boeing Company could have no way of moving in large missiles. This could easily be done, of course, by barges whether or not John Day Dam were ever built and completed; i.e., the John Day dam pool is not needed to pro-

vide adequate water depth at the port site to accommodate sufficiently large barges. The presence of a good port site directly in front of the Boardman Space Age Park makes the venture economically and engineeringly feasible which would not be the case if no such port site existed.

Since the value of land is directly keyed to its best potential use, and since a good port site is absolutely essential to the development of the Space Age Park, I do not think it would be at all unreasonable to pay not less than $50,000 for the Castle Rock port site if the same were for sale.

/s/ A. Leppaluoto
CAPT. A. LEPPALUOTO

SUBSCRIBED and sworn to before me this 2nd day of April, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My Commission expires: 12-8-67

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[Title Omitted]

AFFIDAVIT OF SAMUEL H. MALLICOAT

STATE OF OREGON)
) ss:
County of Multnomah)

SAMUEL H. MALLICOAT, being first duly sworn upon oath depose and say:

I am the Administrator of the Division of Planning and Development, Department of Commerce, State of Oregon, and am well informed concerning the background and sequence of events relating to the acquisition by the State of Oregon of the area known as the Boardman Space Age Project near Boardman, Oregon.

Approximately five years ago, when I was the Assistant Director of the Department of Planning and Development, a possibility arose that one of the major aeronautical companies engaged in missile development might be induced to locate a missile testing or other similar site in Eastern Oregon.

Preliminary surveys were instituted and, through the assistance of personnel of the State Highway Department and a group of public spirited citizens (who formed a non-profit corporation for the sole purpose of acquiring [fol. 54] options on the necessary lands for such a site) work was begun toward acquiring the necessary options.

The physical requirements for such a site were essentially a large enough area so that the testing procedures would not disturb other inhabitants; sufficient water frontage to develop a port site for the loading and off-loading of large missiles and other heavy equipment by barge; access to rail and major arterial highways; and

sufficient area so that explosions or other testing procedures would not involve the danger of harm to other inhabitants in the area.

The only really feasible location was in the vicinity of the Boardman Bombing Range, then under the control of the United States Navy and located south and slightly west of Boardman, Oregon. To acquire sufficient acreage and the necessary waterfront necessitated acquiring title or control to the bombing range from the Navy and title or control from private owners as to the lands located between the Columbia River and the northern boundaries of the bombing range.

Over a period of months state agents acquired options to purchase or lease options from the various owners of the lands lying between the Columbia River and the Boardman Bombing Range. Meanwhile, negotiations were underway with the United States to acquire title to the bombing range.

R. B. Rands and Josephine Rands owned waterfront lands on the Columbia River and a most feasible location for construction of the necessary port facilities to service the project, once completed and in use. As a consequence, state agents consummated a lease option with Mr. and Mrs. Rands, dated November 1, 1962, a copy of which is attached hereto. The lease option was segregated into parcels, for which the sum of $150 per acre was named as the price for most of the land, and the sum of $400 per acre for that portion denominated as port-site lands; ie., Government Lot 1, Section 8, Township 4 North, Range 24 E.W.M., and Government Lots 3 and 4, Section 9, Township 4 North, Range 24 E.W.M.

Subsequently, the State of Oregon elected not to exercise its option to purchase although it retained its lease of the premises. Thereafter, the United States served the usual notices of taking on much of the land; and condem- [fol. 55] nation suits have been concluded or are now pending. Title vested in the United States, of course, effective upon the date of filing such notices and on September 25, 1963, the United States by quitclaim deed transferred title to the area between the Columbia River and the bombing range to the State of Oregon pursuant

to the authority contained in Section 108 of Public Law 86-645 relating to port and industrial lands. A copy of such deed is attached hereto. Included in the transfer were the lands of R. B. and Josephine Rands denominated as Tract 2514 in the above entitled cause.

Following the acquisition of title, the State of Oregon thereupon leased the entire area to the Boeing Company for use as a missile site, and it is under lease to that company as of this date.

/s/ Samuel H. Mallicoat
SAMUEL H. MALLICOAT

Subscribed and sworn to before me this 5th day of April, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My Commission Expires: 12-8-67

[fol. 56] ATTACHMENT TO AFFIDAVIT

LEASE OPTION

THIS AGREEMENT made as of the 1st day of November, 1962, by and between R. B. RANDS and JOSEPHINE RANDS, husband and wife, hereinafter referred to as "Landlord", and THE DEPARTMENT OF PLANNING & DEVELOPMENT OF THE STATE OF OREGON, or its assigns, hereinafter referred to as "Tenant", WITNESSETH:

THAT WHEREAS, the tenant is acquiring by lease or purchase industrial sites in North Morrow County, Oregon, for the purpose of developing industry and increasing employment opportunities in the State of Oregon, and

WHEREAS, port facilities and land adjacent thereto are an important aspect of the industrial development along the Columbia River in North Morrow County, Oregon,

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration, the landlord does hereby lease unto the tenant the lands hereinafter described and also grants to the tenant the option to purchase the property hereinafter described for and in consideration of the sums hereinafter mentioned for a term of ten years or until the pool of the John Day Dam has been raised to its final heighth for a period of six months, whichever shall occur first. During the term of this lease, the tenant, or its assigns, shall have the right to purchase the land hereinafter described for the prices hereinafter set forth by giving written notice of the exercise of its option to the landlord at Boardman, Oregon, or to such other address as the landlord shall give to the tenant in writing.

The landlord gives the tenant the right to purchase the following described property for One Hundred Fifty Dollars ($150.00) per acre under the terms of the option above mentioned:

[fol. 57] Township 4 North, Range 24, East of the Willamette Meridian

Section 10 All that portion of Lots 1, 2, 3 and 4, lying North of the O.R.R. & N. Railroad line, comprising 83.8 acres, more or less, except the landlord reserves unto themselves, their heirs and assigns, all rights to gravel deposits upon these premises, and the right to remove the same.

Section 9 Lots 1 and 2, comprising 30.5 acres, more or less

Section 8 Lot 2, comprising 5 acres, more or less

Township 4 North, Range 23, East of the Willamette Meridian

Section 13 Lots 1, 2, 3 and 4, comprising 106.5 acres, more or less.

The tenant agrees to pay Four Hundred Dollars ($400.00 per acre for the port site property described as follows:

Township 4 North, Range 24, East of the Williamette Meridian

Section 8 Lot 1, comprising 12 acres, more or less

Section 9 Lots 3 and 4, comprising 50 acres, more or less

The landlord and tenant agree that the exact acreage to be purchased by the tenant under the terms of this option shall be based upon a survey made of the area by a certified surveyor mutually agreeable to the landlord and to the tenant.

DONE and DATED as of the 1st day of November, 1962.

R. B. RANDS

JOSEPHINE RANDS
LANDLORD

S. H. MALLICOAT
Director of the Department of Planning & Development of the State of Oregon

TENANT

[fol. 58] ATTACHMENT TO AFFIDAVIT

QUITCLAIM DEED

THIS INDENTURE, made by and between the United States of America, acting by and through the Secretary of the Army, under and pursuant to the powers and authority contained in Section 108 of the Act of Congress approved July 14, 1960 (Public Law 86-645; 74 Stat. 486), party of the first part, and the State of Oregon acting by and through its State Land Board, party of the second part.

WHEREAS, pursuant to said Act and to the Delegations, Rules and Regulations of the Secretary of the Army, as published in the Federal Register of March 11, 1961 (Volume 26, No. 47, pages 2117 - 2118), it has been determined (1) that the development of port and industrial facilities on the hereinafter described land within the John Day Lock and Dam Project, a water resource development project under the jurisdiction of the Department of the Army, will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the John Day Lock and Dam; and (3) that disposition of such land for this purpose will serve the objectives of the John Day Lock and Dam Project.

NOW, THEREFORE, the party of the first part, for and in consideration of the sum of SEVENTEEN THOUSAND FIVE HUNDRED AND NO/100 Dollars ($17,500.00) hereby conveys and quitclaims unto the party of the second part, its successors and assigns, for port and industrial purposes in accordance with the provisions of Section 108 of Public Law 86-645, subject to the exceptions, reservations, restrictions, covenants and conditions hereinafter set forth, all right, title and interest of the United States of America in and to the real estate described as follows:

A tract of land lying in Sections 13, 14, 15, 19, 20, 21, 22, 23 and 30 in Township 4 North, Range 23, and Sections 7, 8, 9, 10, 15, 17 and 18 in Township 4 North, Range 24 all East of the Willamette Meridian, Morrow

County, Oregon, said tract of land being more particularly described as follows:

Beginning at the point of intersection of the west line of said Section 30 and the southerly right-of-way line of the hereinafter described proposed relocation of the Oregon-Washington Railroad and Navigation Company's right of way;

thence southerly along said west line of Section 30 to the existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the south line of the northeast quarter of the northwest quarter of said Section 30;

thence easterly along said south line to the southeast corner thereof;

thence northerly along the east line of said northeast quarter of the northwest quarter to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the east line of said Section 30;

thence northerly along said east line to the northeast corner thereof;

thence easterly along the south line of said Section 20 to the southeast corner thereof;

thence northerly along the east line of said Section 20 to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the west line of the southeast quarter of the northwest quarter of said Section 22;

thence southerly along said west line to the southwest corner thereof;

thence easterly along the south line of the southeast quarter of the northwest quarter and the south line of the southwest quarter of the northeast quarter of said Section 22 to the southeast corner thereof;

[fol. 59] thence northerly along the east line of said southwest quarter of the northeast quarter to said existing northerly right-of-way line of U. S. Highway No. 30;

thence northeasterly along said right-of-way line to the east line of said Section 23;

thence northerly along the east line of said Section 23 and 14 to a point lying 475 feet northerly of the southeast corner of said Section 14;

thence North 75°42'17" East to a point on the east line of the southwest quarter of the southwest quarter of said Section 13;

thence northeasterly along a straight line to the northeast corner of the south half of the southwest quarter of said Section 13;

thence easterly along the south line of Government Lot 2 in said Section 13 to the southeast corner thereof;

thence northerly along the east line of said Government Lot 2 a distance of 330 feet;

thence northeasterly along a straight line to a point on the east line of said Section 13, said point lying 730 feet southerly of the northeast corner of the northeast quarter of the southeast quarter of said Section 13;

thence southerly along the east line of said Section 13 to the southwest corner of Government Lot 5 in said Section 18;

thence easterly along the south line of said Government Lot 5 to the southeast corner thereof;

thence northerly along the east line of said Government Lot 5 to the northeast corner thereof;

thence easterly along the east-west center line of said Section 18 to the east line thereof;

thence northerly along the west line of said Section 17 to a point lying 4,360 feet from the southwest corner thereof;

thence North 83°16'28" East a distance of 2,135 feet;

thence northeasterly along a straight line to the southwest corner of said Section 9;

thence easterly along the south line of said Section 9 to the southeast corner thereof;

thence southerly along the west line of said Section 15 in Township 4 North, Range 24 East to said existing northerly right-of-way line of U. S. Highway No. 30;

thence easterly along said northerly right-of-way line to the east line of said Section 15;

thence northerly along the east line of said Sections 15 and 10 to a point on the ordinary high-water line on the south bank of the Columbia River;

thence westerly along said ordinary high-water line to the west line of Government Lot 3 in said Section 21;

thence southerly along said west line of Government Lot 3 to a point lying northerly a distance of 430 feet from the southwest corner of said Government Lot 3;

thence North 88°38'11" East to a point on the west line of Government Lot 1 in said Section 21;

thence southeasterly along a straight line to the southeast corner of said Government Lot 1;

thence easterly along the south line of Government Lot 4 in said Section 22 to the southeast corner thereof;

thence southerly along the west line of the southeast quarter of the northwest quarter of said Section 22 to said southerly right-of-way line of the hereinafter described proposed relocation of the Oregon-Washington Railroad and Navigation Company's right of way;

thence southwesterly along said right-of-way line to the point of beginning.

Also a tract of land lying in the east half of said Section 23, said tract of land lying southerly of the existing southerly right-of-way line of U. S. Highway No. 30 and northerly of the following described line:

Beginning at the point of intersection of the existing northerly right-of-way line of U. S. Highway 30 and the east line of said Section 23;

thence South 74°56'20" West, a distance of 1,670 feet;

thence South 42°26'00" East, a distance of 640 feet;

[fol. 60] thence South 11°51'00" West, a distance of 1,130 feet;

thence North 86°31'00" West, a distance of 530 feet;

thence North 02°06'00" West, a distance of 870 feet;

thence North 28°50'00" West, to said northerly highway right-of-way line;

thence South 74°56'20" West, to the intersection of said highway right-of-way line and the west line of the northeast quarter of said Section 23 and the point of terminus of the above-described line.

There is excepted therefrom all that portion lying within the above-referred-to proposed relocation of the right of way for the Oregon-Washington Railroad and Navigation Company, said right of way lying at variable distance on each side of the following-described center-line survey;

Commencing at a point lying North 86°33'19" West a distance of 3,250.76 feet from the west quarter corner of said Section 30;

thence North 72°57'47" East a distance of 1,011.38 feet to Equation Station 5790 + 38.88 P.T. Back which equals station 5790 + 16.91 P.T. Ahead and the TRUE POINT OF BEGINNING;

thence North 72°57'47" East a distance of 7,391.96 feet to Station 5864 + 08.87 P.C.;

thence easterly along an increasing spiral curve to the right through a delta angle of 0°06′18″ a distance of 70 feet to Station 5864 + 78.87 P.C.C.;

thence easterly along a 0°18′ curve to the right a distance of 843.87 feet to Station 5773 + 22.74 P.C.C.;

thence easterly along a decreasing spiral curve to the right through a delta angle of 0°06′18″ a distance of 70 feet to Station 5773 + 92.74 P.T., which point lies North 87°32′41″ West a distance of 4,909.17 feet from the southeast corner of said Section 20;

thence North 75°42′17″ East a distance of 31,607.26 feet to Equation Station 6090 + 00, which point lies North 47°38′29″ East a distance of 177.69 feet from the southwest corner of said Section 13;

thence continuing North 75°42′17″ East a distance of 8,222.31 feet to Station 6172 + 22.31 P.C.;

thence easterly along an increasing spiral curve to the right through a delta angle of 0°6′18″ a distance of 70 feet to Station 6172 + 92.31 P.C.C.;

thence easterly along a 0°18′ curve to the right a distance of 1,442.98 feet to Station 6200 + 33.19 P.C.C.;

thence easterly along a decreasing spiral curve to the right through a delta angle of 0°6′18″ a distance of 70 feet to Equation Station 6201 + 03.19 P.T. Back which equals Station 6203 + 10.85 P.T. Ahead;

thence North 84°08′14″ East a distance of 4,689.15 feet to Station 6250 + 00 which point lies South 7°41′39″ West a distance of 2,432.98 feet from the northeast corner of said Section 17;

thence continuing North 84°08′14″ East a distance of 12,000.00 feet to Station 6370 + 00 which point lies South 38°52′04″ East a distance of 1,469.66 feet from the southeast corner of said Section 10 and the point of terminus of the above-described center line.

The width (in feet) measured at right angles and/or radially from the above-described center-line survey is as follows:

STATION	TO STATION	WIDTH NORTHERLY OF CENTER LINE	WIDTH SOUTHERLY OF CENTER LINE
5790 + 38.88 P.T.			
5790 + 16.91 P.T.	5880 + 00	100	100
5880 + 00	5884 + 00	130	100
5884 + 00	5931 + 00	100	100
5931 + 00	5938 + 00	180	140
5938 + 00	6064 + 00	100	100
6064 + 00	6064 + 50	240	100
6064 + 50	6074 + 00	240	180
6074 + 00	6075 + 00	240	100
6075 + 00	6238 + 00	100	100
6238 + 00	6246 + 00	100	200
6246 + 00	6253 + 00	100	120
6253 + 00	6370 + 00	100	100

[fol. 61] There are also excepted therefrom all those portions of Government Lots 1, 2, and 3 in Section 21, all of Sections 13 and 15 in said Township 4 North, Range 23 East, and Section 9 in said Township 4 North, Range 24 East, lying within the existing right of way for the Oregon-Washington Railroad and Navigation Company.

The land above described contains 2,261.00 acres, more or less.

NOTE: All bearings are referred to the Oregon Coordinate System, North Zone, unless otherwise specified.

SUBJECT TO the following exceptions, and rights outstanding in third parties:

1. Existing easements for public roads and highways, public utilities, railroads and pipelines.

2. Conditions contained in Public Land Order No. 3237 dated 24 September 1963 withdrawing and reserving certain of the lands herein conveyed for the John Day Lock and Dam Project.

EXCEPTING, SAVING AND RESERVING unto the United States of America and its assigns, from this conveyance the following rights, powers, privileges and easements, namely:

1. The perpetual right, power, privilege and easement in, upon, over and across lands described herein for the purpose of inundation, overflow, saturation, percolation and wave action which may result from a pool, including backwater effect, created by water level at John Day Dam to elevation 268 feet above mean sea level, U.S.C. & G.S. Datum; provided no structures for human habitation shall be constructed or maintained on said land, and provided further that no structures shall be constructed on the land except as may be approved in writing by the representative of the United States in charge of the project.

2. The right to construct, operate and maintain navigation markers, aids, and/or ranges, water gaging stations, communication facilities, access roads, their appurtenances, and other facilities necessary and/or convenient for the operation and maintenance of the John Day Lock and Dam Project consistent with the operations of port and industrial facilities on said lands.

3. The right of the officers, agents and employees of the United States to enter upon the lands hereby conveyed at any time and for any purpose necessary or convenient in connection with the reservations and conditions and the operation and maintenance of the John Day Lock and Dam Project in order to fully accomplish the several purposes for which said project was authorized, provided such entry shall be exercised at such times and for such purposes as not to interfere unreasonably with port and industrial operations.

AND FURTHER, excepting, saving and reserving to the United States the right and easement until 31 December 1974, to clear, borrow, excavate and remove rock, soil and other similar materials from the following described land:

A tract of land lying in Government Lots 3 and 4, in Section 18, Township 4 North, Range 24 East of the

Willamette Meridian, Morrow County, Oregon, said tract of land being described in two (2) parcels as follows:

[fol. 62] *Parcel a:* Commencing at a point lying South 67°49'01" West, a distance of 6729.70 feet from the quarter Section corner common to Sections 8 and 17 of said Township and Range;

thence North 57°53'23" East, a distance of 1011.99 feet to THE TRUE POINT OF BEGINNING;

thence South 57°53'23" West, a distance of 1156.99 feet;

thence North 32°06'37" West, to a point on the southerly right-of-way line of the Oregon-Washington Railroad and Navigation Company;

thence northeasterly along said southerly right-of-way line, to a point of intersection with a line bearing North 32°06'37" West from the point of beginning;

thence South 32°06'37" East to the point of beginning.

Parcel b: Beginning at a point lying South 67°49'01" West, a distance of 6729.70 feet from said quarter Section corner common to Sections 8 and 17;

thence South 32°06'37" East, a distance of 500 feet;

thence North 57°53'23" East, a distance of 150 feet;

thence North 32°06'37" West, a distance of 500 feet;

thence South 57°53'23" West, a distance of 150 feet to the point of beginning.

The tract of land above described contains 21.90 acres, more or less;

together with the right and easement to construct, operate, maintain and repair an access road thereto, over and across the lands herein conveyed; PROVIDED, that the exercise of such rights and easements shall not unreason-

ably interfere with the development or operation of the lands conveyed for the purposes provided herein.

If it is determined by the party of the second part that the exercise of such reserved rights and easements by the United States unreasonably interferes with the development and use of the lands conveyed herein, then, and in that event, the United States will terminate its use of said lands and remove any equipment or improvements placed thereon by the United States or its contractors and will convey such reserved rights and easements to the party of the second part without additional monetary consideration; PROVIDED, that prior to such vacation and conveyance, and as a condition thereto, the United States shall have without cost, comparable rights and easements in a substitute source of materials acceptable to the United States.

The said party of the second part does by the acceptance of this deed, covenant and agree for itself, its successors and assigns, forever, as follows:

1. That the use of said lands by the party of the second part, its successors or assigns will be such that conditions allowing erosion of the lands due to wind or wave action or other causes will not be created or enhanced. Should erosion due to such use by the party of the second part, its successors or assigns, take place in such volume or extent that, in the opinion of the representative of the United States in charge of the John Day Lock and Dam Project, the value of these or neighboring areas is materially reduced or activities adversely affected, the party of the second part, its successors or assigns will, without cost or expense to the United States, take such action as is necessary or expedient to stabilize, rehabilitate and protect the areas affected by erosion to the satisfaction of the said representative of the United States.

[fol. 63] 2. That the lands herein conveyed shall not be used in any manner which will result in the deposit of any material, floatable or non-floatable, into the John Day reservoir or liable to be washed into the reservoir by storms or floods or otherwise which materials would be detrimental to navigation and/or to the operation of the John Day Lock and Dam Project.

3. To comply with all State and Federal laws and regulations with regard to the disposal or emptying of pollutants of any nature into the waters of the John Day reservoir.

4. To obtain any permit(s) required by Section 10 of the Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403).

5. That portions of the lands conveyed on which development has not commenced will remain open for public access, provided, however, that the party of the second part, its successors or assigns, shall not be required to construct road access or improvements other than for port and industrial purposes.

6. To use the land herein conveyed for port and industrial purposes in accordance with the provisions of Section 108 of Public Law 86-645 and to develop port and industrial facilities thereon within twenty (20) years from the date of this deed, substantially in accordance with the plan of development, dated March 1963, entitled, "A Waterfront Plan for the Boardman Space Age Industrial Park," which plan is on file in the office of the District Engineer, Walla Walla, Washington, and in the office of the Oregon State Land Board, Salem, Oregon.

PROVIDED, HOWEVER, that if the land herein conveyed, or any part thereof, be used for other than port and industrial purposes by the party of the second part, its successors or assigns, or in the event the said party of the second part, its successors or assigns, fail to develop port and industrial facilities as required by Condition 6 above, then all right, title and interest to the land herein conveyed shall revert to and become property of the United States at its option, subject to the conditions hereinafter set forth, provided, however, the sole remedy of the United States of America, in event of such breach, shall be the exercise of its option of reverter.

In the event of a breach of the above condition pertaining to port and industrial use, the United States of America, before claiming any forfeiture hereunder, shall give notice in writing of said breach to the then owner of the premises. Said owner shall within a period of ninety (90) days after receipt of such notice, initiate steps to correct and cure said breach, and thereafter pro-

ceed with due diligence until completion of the same within one (1) year from said notice. In the event of the failure or refusal of the then owner to correct and cure said breach as aforesaid, said owner shall have a reasonable time, not to exceed 180 days, to remove any improvements that have theretofore been placed upon said premises. Such right of removal shall under no circumstances permit the owner to cause damage to the land involved. In the event that said owner fails to remove said improvements within the time limited, they shall become the property of the United States of America.
[fol. 64] Failure of the United States to serve notice in the event of a breach of any condition or covenant herein imposed shall not be construed as a waiver or relinquishment of the said reversionary rights of the United States.

The party of the second part, its successors or assigns shall reconvey to the United States of America by quitclaim deed any lands which may so revert as the result of breach of any condition or covenant herein imposed, free and clear of all liens and encumbrances created thereon by the party of the second part, its successors or assigns.

TO HAVE AND TO HOLD the above-described premises unto the said party of the second part, its successors and assigns, forever, subject to the exceptions, reservations, restrictions, covenants and conditions herein contained.

IN WITNESS WHEREOF, the United States of America has caused these presents to be executed in its name by Cyrus R. Vance, Secretary of the Army, and the seal of the Department of the Army to be hereunto affixed this 25th day of September, 1963.

UNITED STATES OF AMERICA

By /s/ Cyrus Vance
Secretary of the Army

[SEAL]

The Foregoing Instrument is accepted for and in behalf of the State of Oregon by its State Land Board and its seal hereunto affixed this 30th day of September, 1963.

By /s/ [Illegible]
Governor

/s/ [Illegible]
Secretary of State

/s/ [Illegible]
State Treasurer

[fol. 65]

STATE OF VIRGINIA)
) ss:
County of Arlington)

25 September 1963. Personally appeared Cyrus R. Vance, who, being duly sworn did say that he is the Secretary of the Army, United States of America, and that the seal affixed to the foregoing instrument is the official seal of the Department of the Army and that said instrument was signed and sealed in behalf of the United States of America under authority of the cited act of Congress; and he acknowledged said instrument to be its voluntary act and deed. Before me:

/s/ A. F. Spada

Notary Public
Arlington County, Virginia

My Commission Expires:

A. F. SPADA, Notary Public
County of Arlington
State of Virginia
My Commission Expires 28 July 1964
96453 Indexed

STATE OF OREGON)
) ss:
County of Morrow)

I Certify that the within instrument was received and filed for record on the 1st day of October 1963 at 10:05 a.m. and duly recorded in book 69, pages 473-480, inc.

STATE OF OREGON)
) ss:
County of Morrow)

I, Sadie Parrish, Clerk of the County Court and ex-officio Clerk of the Circuit Court, hereby certify that the above and foregoing copy:

QUITCLAIM DEED

has been by me compared with the original and that the same is a true and correct transcript of the whole thereof as the same appears of record and on file in my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 26th day of March, 1965.

/s/ SADIE PARRISH
Clerk of Morrow County, Oregon

[fol. 66]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

VERDICT TRACT No. 2514—April 6, 1965

We, the trial jury, duly empaneled to try the above cause, do find that the sum of $7,000.00 is just compensation for the property taken, to-wit: Tract No. 2514.

DATED this 6th day of April, 1965.

/s/ ZOE W. MORGAN
Foreman

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION FOR JUDGMENT, TRACT 2403—
Filed April 16, 1965

IT IS HEREBY STIPULATED AND AGREED by and between plaintiff and R. B. Rands and Josephine Rands, husband and wife, defendants herein, by and through their attorney, Alex L. Parks, as follows:

(1) The Court may enter judgment herein awarding the estate and interest in the land designated as Tract No. 2403, and described in the complaint in condemnation to plaintiff as prayed for in said complaint.

(2) Just compensation payable to plaintiff for the taking of said estate in land shall be the sum of $2,420.00, inclusive of interest.

DUSENBERY, MARTIN,
BEATTY & PARKS

/s/ Alex Parks
Attorneys for the defendants
Rands

/s/ Sidney I. Lezak
United States Attorney,
District of Oregon

[fol. 68]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX, R. B. RANDS, ET AL., DEFENDANTS

JUDGEMENT IN CONDEMNATION, TRACTS 2403 AND 2514—
April 6, 1965

This action having been tried and a verdict fixing just compensation having been duly rendered on the 6th day of April, 1965, as to Tract 2514, and the parties having stipulated as to Tract 2403,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that title to Tracts Nos. 2403 and 2514 described in the Declaration of Taking herein, became vested in plaintiff on August 13, 1963, and that just compensation which plaintiff shall pay for the taking of the estate is the total sum of $9,420.00, together with interest at the rate of six percent per annum on the sum of $1,620.00 from the 13th day of August, 1963 until said sum of $1,620.00 shall be deposited in the Registry of the Court.

ENTERED this 6 day of April, 1965.

/s/ John F. Kilkenny
Judge

PRESENTED BY:

/s/ Joseph E. Buley
Assistant United States Attorney

[fol. 69]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL BY DEFENDANTS RANDS—
Filed June 4, 1965

NOTICE is hereby given that R. B. Rands and Josephine Rands, husband and wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 6th, 1965.

DATED: This 4th day of June, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of Attorneys for said defendants
Office and Post Office Address
1107 Standard Plaza
Portland, Oregon

[fol. 70]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION RE APPEAL BOND—Filed June 4, 1965

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys that the bond on appeal under Rule 73(c) of the Federal Rules of Civil Procedure may be dispensed with in connection with defendants' appeal to the United States Court of Appeal for the Ninth Circuit from the judgment entered herein on April 6, 1965, and the defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Counsel for defendants further stipulate that they will pay all costs accrued by the Clerk incident to the preparation of the record and docketing of said appeal.

DATED this 4th day of June, 1965.

UNITED STATES ATTORNEY

By: /s/ Joseph E. Buley
Assistant U. S. Attorney

DUSENBERY, MARTIN, BEATTY & PARKS

By: /s/ Alex L. Parks
Of Attorneys for Defendants-Appellants

[fol. 71]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STATEMENT OF POINTS—Filed July 9, 1965

The points upon which appellants intend to rely on this appeal are as follows:

(1) The court erred in not permitting appellants to amend their Notice of Appearance to assert an affirmative defense that the plaintiff United States of America lacked authority and jurisdiction to take the property in question because it was not taken for a "public purpose"; and

(2) The court erred in refusing to permit appellants to introduce evidence before the jury of the value of a portion of said property as a port-site; to-wit, Government Lots 1 and 2, Section 8, Township 4 North, Range 24 East, Willamette Meridian.

DATED: This 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for Appellants R. B. and Josephine Rands

[fol. 72]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION AS TO RECORD ON APPEAL—
Filed July 9, 1965

IT IS HEREBY STIPULATED by and between the parties hereto that the record on appeal herein shall consist of the following items:

(1) Complaint

(2) Declaration of Taking dated July 12, 1963, and filed August 13, 1963.

(3) Notice of Appearance by appellants' Rands.

(4) Motion by appellants' Rands to amend Notice of Appearance to permit assertion of affirmative defenses, with accompanying affidavit in support of motion, dated September 26, 1963

(5) Judgment on Declaration of Taking and Order of Possession

(6) Opinion and Order dated October 16, 1963, denying Motion to Amend Notice of Appearance

(7) Memorandum Opinion dated October 12, 1964, relative to question presented in advance of trial as to admissibility of evidence relating to value of a portion of appellants' lands as a port-site

(8) Stipulation for Judgment on Tract 2403

[fol. 73] (9) Pre-Trial Order dated April 5, 1965

(10) Reporter's Transcript relative to limited offer of proof relating to port-site value

(11) Stipulation dated April 6, 1965, relative to offer of proof and accompanying affidavits accepted under offer of proof

(12) Verdict dated April 6, 1965, relating to Tract 2514

(13) Judgment on Tract 2403 and 2514
(14) Notice of Appeal dated June 4, 1965
(15) This Stipulation

DATED: This 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants R. B. and Josephine Rands

SIDNEY LEZAK, United States Attorney

By /s/ Joseph Buley
Assistant United States Attorney
Of counsel for Plaintiff United States of America

[fol. 74]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

MOTION—Filed July 9, 1965

COMES now the appellants in the above entitled cause and moves the Court for an order extending the time to and including July 23rd, 1965 in which to prepare and file the record on file in the above entitled cause.

In support of the above motion, reference is made to the Stipulation and affidavit of counsel attached hereto.

DATED this 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for appellants' Rands

[fol. 75]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION—Filed July 9, 1965

IT IS HEREBY STIPULATED by and between the parties hereto that the appellants' may request an extension of time to and including July 23rd, 1965 for the Clerk of the Court to complete the preparation and filing of the record on appeal in the above entitled cause, and that the plaintiff UNITED STATES OF AMERICA has no objection thereto.

DATED this 9th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for appellants' Rands

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant United States Attorney
Of counsel for Plaintiff United States of America

[fol. 76]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

AFFIDAVIT OF ALEX L. PARKS—Filed July 9, 1965

STATE OF OREGON)
) ss
County of Multnomah)

ALEX L. PARKS, being first duly sworn on oath deposes and says:

That he is one of the counsel of record for appellants' R. B. and Josephine Rands in the above entitled cause.

That the parties to the appeal agreed locally upon a Stipulation as to Designation of Record on Appeal, and that the form thereof was transmitted to the office of the Attorney General, Washington, D.C. for formal approval. That such approval was not forthcoming until on or about July 8, 1965.

That the record on appeal in the above entitled cause must be filed with the Court of Appeals, Ninth Circuit, on or before July 14th and the Clerk of the Court indicates that the same cannot be prepared and filed by that date due to the late filing of the said Stipulation as to Designation of Record.

That a brief extension of time to and including the 23rd dayof July, 1965, in which to prepare and file said record on appeal would enable the clerk to do so.

[fol. 77] DATED: This 9th day of July, 1965.

/s/ Alex L. Parks

SUBSCRIBED and sworn to before me this 9th day of July, 1965.

/s/ Pamela Bowes
Notary Public for Oregon
My commission expires: 12-8-67

[fol. 78]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

ORDER—July 9, 1965

THIS MATTER having come before the Court upon motion of appellants' Rands for an order extending the time in which the record on appeal may be filed with the Court of Appeals, and the Court being fully advised in the premises, and there being good cause shown therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that appellants Rands are hereby granted an extension of time to and including July 23, 1965, in which to file the record on appeal in the above entitled cause with the Court of Appeals.

DATED this 9th day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 79]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

[File Endorsement Omitted]

[Title Omitted]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED by the parties to the above-entitled cause that the Clerk may release the files and records in this cause for the purpose of having the same photocopied in connection with the pending appeal.

DATED this 16th day of July.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants-appellants

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant U. S. Attorney
Of counsel for plaintiff-respondent

IT IS SO ORDERED this 19th
day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 80]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 63-380

* * * *

[Title Omitted]

STIPULATION AND ORDER

IT IS HEREBY STIPULATED by the parties to this cause that the Clerk may transmit the original exhibits to the Court of Appeals in connection with the pending appeal.

DATED this 16th day of July, 1965.

DUSENBERY, MARTIN, BEATTY & PARKS

By /s/ Alex L. Parks
Of counsel for defendants-appellants

SIDNEY LEZAK, United States Attorney

By /s/ Joseph E. Buley
Assistant U. S. Attorney
Of counsel for plaintiff-respondent

IT IS SO ORDERED this 19th day of July, 1965.

/s/ John F. Kilkenny
Judge

[fol. 81]

IN THE UNITED STATES DISTRICT COURT

Amend Notre by Interlineation

Jury demand date: August 13, 1963 Pltf.
Feb. 24, 1964—Deft.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES FOX and EMMA FOX, husband and wife; GEORGE L. FOX and LUCILE H. FOX, husband and wife; A. H. HARDING and ESTHER E. HARDING, husband and wife; H. G. GOSNEY, doing business as Umatilla Sand and Gravel Company; GEORGE SHANE, JR., a single man; R. B. RANDS and JOSEPHINE RANDS, husband and wife; FERDINAND EMBERGER and JANE DOE EMBERGER, husband and wife; ROYAL H. RANDS and LOUISE RANDS, husband and wife; WEST EXTENSION IRRIGATION DISTRICT; NORTHERN PACIFIC RAILWAY COMPANY; FANNIE SLEVIN, a single woman; CLYDE HOYT and NELLIE HOYT, husband and wife; JAMES F. MCMILLIN and MADELINE MCMILLIN, husband and wife; ROBERT HOYT and THULA HOYT, husband and wife; MARVIN SIMMONS, and NORMA J. SIMMONS, husband and wife; STATE OF OREGON; GILLIAM COUNTY, MORROW COUNTY, SHERMAN COUNTY, AND UMATILLA COUNTY, municipal corporations and political subdivision of the State of Oregon, and 341.47 ACRES OF LAND, more or less, situate in Gilliam, Morrow, Sherman and Umatilla Counties, State of Oregon, DEFENDANTS

Call Date: Oct. 21, 1963

For plaintiff:

Sidney I. Lezak, Act. U.S. Atty.
506 U.S. Courthouse
Portland, Oregon
Joseph E. Burley, Asst. U.S. Atty.

For defendants Rands: Dusenbery, Martin, Beatty & Parks; 1107 Standard Plaza (4) and Mahoney & Abrams;
Robert B. Abrams
P. O. Box 428, Heppner, Ore.

For Northern Pac. Rlwy. Co.:
Don H. Marmaduke; Rockwood, Davies, Biggs, Strayer and Stoel
1410 Yeon Bldg. (4)

For defts. McMillan: Mahoney & Abrams
Robt. B. Abrams P. O. Box 428, Heppner, Ore. (also for defts. Hoyt,

For defts. Harding: Wilbur K. Wilson
414 Pittock Block (5)

For defts. Marvin and Norma Simmons
Currin & French, Pendleton, Oregon

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed SEP 5 1963	Clerk		US		
		1965			
J.S. 6 mailed MAY 5 1965	Marshal	6/4	34477	5.00	
		"	Treas.		5.00
Basis of Action: Land Condemnation	Docket fee				
	Witness fees				
Action arose at:	Depositions				

[fol. 82]

DOCKET ENTRIES

Date			Date Order or Judgment Note
1963			
Aug.	13	Filed Complaint In Condemnation and Demand for Jury Trial	
	13	Filed Declaration of Taking	
	13	Issued Notice to Marshall	
	14	Filed and entered Judgment on the Declaration of Taking and Order of Immediate Possession re tracts 2164, 2165-1, 2165-2, 2403, 2514 and 2528 as of Aug. 14 1963 and further Order of Immediate Possession on Tracts 1617-1. 1617-2, 3300, 3305 and 3313 as of January 1, 1964	E
Sep	3	Filed Notice of Appearance of defts. R. B. Rands and Josephine Rands	
	3	Filed Petition for Partial Distribution of Funds, Tracts 2403 and 2514	
	10	Filed pltf's motion to amend by interlineation, the Judgment on Declaration of Taking and Order of Immediate Possession	
	10	Filed and entered order granting pltf's motion to amend Judgment on Declaration of Taking and Order of Immediate Possession (on motion)	K
	17	Filed disclaimer of deft. Northern Pac. Rlwy. Co.	
	27	Filed Association of Counsel of the firm of Dusenbery, Martin, Beatty & Parks as co-counsel with Mahoney & Abrams for defts. Rand	
	27	Filed Motion of defts. Rands to amend their Notice of Appearance	
Oct	2	Filed deft's Memorandum of Points and Authorities	
	4	Filed pltf's Memorandum in opposition to motion re-enlargement of time to file ans.	
	7	Record of hearing on motion to amend Notice of Appearance; entered order taking under advisement	K
	14	Filed deft's supplemental points and authorities	
	16	The Court hands down an Opinion and Order and directs that it be filed	K

Date			Date Order or Judgment Note
1963			
	16	Filed and entered Opinion and Order denying motion of deft. for permission to file an answer setting up a defense challenging right to condemn deft's property	K
	18	Filed pltf's motion to amend by interlineation	
	18	Filed and entered order allowing motion to amend by interlineation, the Complaint, Notice and Judgment on Declaration of Taking and Order of Immediate Possession (on motion)	K
Nov	27	Entered order setting for pretrial conf. March 1964	K
1964			
Feb	20	Entered order setting for pretrial, Pendleton Cal., April 13, 1964 at 9:30 A.M. in Portland	K
	24	Filed notice of appearance of defts. James F. McMillan and Madeline McMillan and demand for trial by jury	
[fol. 83]			
	24	Filed notice of appearance of defts. Clyde Hoyt and Nellie Hoyt	
	24	Filed notice of appearance of defts. Robert Hoyt and Thula Hoyt	
	28	Filed pltf's motion for order of default of Gilliam Co.	
	28	Filed and entered order allowing pltf's motion for default of Gilliam Co.	K
	28	Filed stip. for judgment and pet. for distribution tracts 2165-1 and 2165-2	
	28	Filed and entered judgment in cond. in sum of $100, vesting title to estate in pltf. Aug. 3, 1963 and further that the Clerk shall disburse the sum of $100 to deft. Geo. Shane, Jr. (tracts 2165-1 and 2165-2)	K
	28	Filed notice of appearance of defts. A. H. Harding and E. E. Harding	
Mar	16	Filed and entered order of distribution, Tracts Nos. 2403 and 2514, of the sum of $6,177.80 to Defts. R. B. Rands and Josephine Rands	E
Apr	6	Entered order striking from cal. of 4/13/64 and resetting case for pretrial conf. 4/17/64 at 2:00 P.M. at Pendleton, Ore. and for trial 5/25/64 at Pendleton term of court	K

Date			Date Order or Judgment Note
1964			
	17	Record of pretrial conf Tract 2164	K
	17	Entered order setting for selection of jury 6/1/64 at 9:30 A.M.—jury view Tract 2164	K
	17	Entered order setting for trial 6/3/64 at 9:30 A.M. (tract 2164)	K
	17	Record of pretrial conf. tract 3300	K
	17	Entered order setting for selection of jury 6/1/64 at 9:30 A.M.—jury view Tract 3300	K
	17	Entered order setting for trial 6/4/64 at 9:30 A.M. Tract 3300	K
June	11	Filed pltf's mot. for order of dismissal as to defts. Ferdinand Emberger and Jane Doe Emberger	
	11	Filed and entered order allowing pltf's mot. for order of dismissal as to defts. Ferdinand Emberger and Jane Doe Emberger (on mot.)	S
	11	Stip. for judgment and pet. for distribution Tract No. 2528	
	11	Filed and entered Judgment in Condem. in sum of $300.00 inclusive of int. and order of distribution of $300.00 to deft. Fannie Slevin upon deposit of additional sum of $120.00 (Tract No. 2528)	S
	11	Filed pltf's mot. for order of default of deft. H. G. Gosney dba Umatilla Sand and Gravel Co.	
	11	Filed and entered order allowing pltf's mot. for order of default of deft. H. G. Gosney dba Umatilla Sand and Gravel Co. (on mot.)	S
	11	Filed affidavit as to military service of deft. H. G. Gosney	
	11	Filed stip. for judgment and pet. for distribution, Tract 2164	
	11	Filed and entered Judgment in Cond. in the sum of $2,000 inclusive of int. and further that the Clerk disburse the sum of $2,000 to defts. A. H. Harding and Esther Harding upon deposit of additional amt. of $900.00 (Tract No. 2164)	S

[fol. 84]

Date		Date Order or Judgment Note
1964		
June	11 Filed pltf's mot. for order of default of defts. Umatilla Co., Ore, and Sherman Co., Ore.	
	11 Filed and entered order of default of defts. Umatilla Co., Ore. and Sherman Co., Ore. (on mot.)	S
	11 Filed stip. for judgment, revestment, and pet. for distribution Tracts Nos. 1617-1 and 1617-2	
	11 Filed and entered Judgment in Cond. in sum of $3,500, revestment, that improvements must be removed from the property on or before Dec. 31, 1964 or defts/ shall forfeit right of removal; that defts/ shall not be required to construct or maintain any fence along boundary line etc. and further, that the Clerk shall disburse the sum of $1,750.00 to James Fox and Emma Fox and the sum of $1,750.00 to Geo. L. Fox and Lucile H. Fox upon deposit of additional amt. of $600.00 (Tracts 1617-1 and 1617-2)	S
July	22 Filed notice with Marshal's returns and "not served" returns as to Ferdinand Emberger, Jane Doe Emberger, Royal H. Rands	
	24 Filed stip. for judgment and pet. for distribution, Tract No. 3305	
	24 Filed and entered Judgment in Condemnation and Order of Distribution, Tract No. 3305 in sum of $950.00 to Clyde Hoyt, Nellie Hoyt, Robt. Hoyt and Thula Hoyt upon deposit of additional amt. of $790.00	K
	24 Filed stip. for judgment and pet. for distribution, Tract 3300	
	24 Filed pltf's motion for order of default of defts. West Extension Irrigation Dist. and Umatilla Co., Ore.	
	24 Filed and entered order allowing pltf's mot. for order of default of defts. West Extension Irrigation Dist. and Umatilla Co., Ore. (on mot.)	K
	24 Filed and entered Judgment in Con. and Order of Distribution, Tract 3300 in sum of $2,000 inclusive of int. and further that the Clerk shall disburse the sum of $2,000 to Clyde Hoyt, Nellie Hoyt, James F. McMillin and Madeline McMillin upon deposit of additional sum of $1,875.00	K

Date			Date Order or Judgment Note
1964			
Sep.	14	Entered order setting pretrial conference 10/9/64, 1:30 P.M., Pendleton, and order setting trial week of 10/19/64	K
	16	Entered order striking pretrial Pendleton 10/9/64 and resetting Pendleton 10/16/64, 1:30 P.M.	K
Oct.	9	Record of pretrial conference	K
	9	Entered order modifying rule in regard to number of expert witnesses and each party will be allowed 3 expert witnesses	K
Oct.	12	Filed memorandum opinion	K
	12	Filed memorandum Brief	K
[fol. 85]			
	16	Filed notice of appearance of Marvin Simmons and Norma J. Simmons, husband and wife, (Tract 3313) and demand for jury trial	
	19	PENDLETON, OREGON Record of jury trial (m 10/21/64) Tract 3313	K
	19	Filed and entered order for jury view Tract 3313 (m 10/21/64)	K
	19	Entered order that verdict be received and filed, Tract 3313 (m 10/21/64)	K
	19	Filed verdict Tract numbered 3313 that the sum of $4,750.00 is just compensation (m 10/21/64)	K
	19	Entered order that judgment be received and filed and judgment entered thereon (m 10/21/64)	K
	19	Entered judgment in condemnation, Tract No. 3313	
	23	Filed judgment in condemnation, Tract No. 3313 that plaintiff shall pay sum of $4,750.00 together with interest at the rate of 6% per annum on the sum of $1,450.00 from the 13th day of August until said sum is deposited into Registry of the Court	K
Nov.	27	Filed petition for distribution of funds Tract No. 3313	
	27	Filed and entered order of distribution of funds Tract No. 3313	E

Date			Date Order or Judgment Note
1965			
Feb.	15	Entered order setting for pretrial conference 3/9/65, 9:00 A.M. in Portland	K
Mar.	1	Entered order striking from calendar 3/8/65 and resetting for pretrial conference 3/15/65, 2:30 P.M. at Portland	
	15	Entered order pretrial order to be lodged by 3/22/65 or lodged at Pendleton on 4/2/65	K
	15	Entere order setting for trial 4/5/65, 9:00 A.M. PENDLETON	K
April	5	Record of jury trial (m 4/16/65)	K
	5	Filed and entered pretrial order (m 4/16/65)	K
	5	Filed plaintiff's motion for order of dismissal as to defendant Royal Rands	
	5	Filed and entered order allowing motion dismissing as to defendant Royal Rands (on mot.) (m 4/16/65)	K
	5	Filed plaintiff's motion for order declaring defendant State of Oregon to be in default, Tracts 2403 and 2514	K
	5	Filed and entered order allowing motion declaring State of Oregon to be in default Tracts 2403 and 2514 (on mot.) (m 4/16/65)	K
	5	Filed plaintiff's motion for order dismissing as to defendant Louise Rands	
	5	Filed and entered order allowing motion to dismiss as to defendant Louise Rands (on mot.) (m 4/16/65)	K
[fol. 86]			
	5	Filed plaintiff's motion for order dismissing as to defendants Ferdinand Emberger and Jane Doe Emberger	
	5	Filed and entered order dismissing as to defendants Emberger (on mot.) (m 4/16/65)	K
	6	Record of jury trial continued (m 4/16/65)	K
	6	Record of jury verdict in favor of defendant for $7,000 (m 4/16/65)	K
	6	Entered order that verdict be received and filed and judgment enter thereon (m 4/16/65)	K
	6	Filed verdict, Tract No. 2514 in the sum of $7,000.00, favor of defendant	

Date		Date Order or Judgment Note
1965		
	6 Filed stipulation that attached affidavits constitute limited offer of proof, etc.	
	PENDLETON	
	6 Filed and entered judgment in condemnation, Tracts 2403 and 2514 in the sum of $9,420.00 together with interest at the rate of six percent per annum on the sum of $1,620.00 from the 13th day of August 1963 until said sum of $1,620.00 shall be deposited in the Registry of the Court (m 4/16/65)	K
	16 Filed stipulation for judgment, Tract 2403	
June	4 Filed notice of appeal by defendants R. B. Rand, et ux—copy mailed to U. S. Atty.	
	4 Filed stipulation that bond on appeal may be dispensed with	
	16 Filed petition for distribution of funds	
	16 Filed and entered order for distribution of sum of $3,420.67 to defendants R. B. Rands and Josephine Rands	S
July	9 Filed Clerk's copy of Reporter's transcript of proceedings of April 6, 1965	
	9 Filed appellants' statement of points on appeal	
	9 Filed stipulation as to designation of record on appeal	
	9 Filed appellants' motion for extension of time to docket appeal	
	9 Filed stipulation in support of motion for extension of time to docket appeal	
	9 Filed affidavit of Alex L. Parks in support of motion for extension of time to docket appeal	
	9 Filed and entered order extending time to July 23, 1965 within which to docket appeal	K
	19 Filed and entered order to release record for photocopying (on stipulation)	K
	19 Filed and entered order to forward exhibits to Court of Appeals (on stipulation)	K

[fol. 86 A]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 63-380

UNITED STATES OF AMERICA, PLAINTIFF

vs.

R. B. RANDS and JOSEPHINE RANDS,
husband and wife, DEFENDANTS

Pendleton, Oregon
April 6, 1965

BEFORE:

HON. JOHN F. KILKENNY, Judge.

APPEARANCES:

MR. JOSEPH E. BULEY, Assistant United States Attorney, of counsel for the Government.

MESSRS. ALEX L. PARKS and ROBERT B. ABRAMS, of counsel for the defendants.

(At the conclusion of the presentation of evidence in behalf of the defendants the following occurred out of the presence and hearing of the jury:)

MR. PARKS: This seems to be an appropriate time to make an offer of proof, based on our stipulation.

THE COURT: Yes. What is your offer?

[fol. 86 B] OFFER OF PROOF

MR. PARKS: This relates to the port site, your Honor.

THE COURT: Yes. This stipulation and the attached affidavits will be viewed by the Court as an offer of proof

that the particular area would be suitable as a port site and as to the valuations that might be placed thereon.

The offer of proof is rejected for the reasons previously given in the formal opinion of the Court.

CERTIFIED:

A true and correct partial transcript of the proceedings in the above-entitled cause.

Dated at Portland, Oregon, this 6th day of July, 1965.

/s/ John S. Beckwith
JOHN S. BECKWITH
Official Court Reporter

[fol. 87]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 89]

[Minute entry of argument and submission—March 7, 1966, omitted in printing]

[fol. 90]

[Minute entry of order directing filing of opinion and filing and recording of judgment—October 7, 1966, omitted in printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Oregon

OPINION—October 7, 1966

Before: BARNES, KOELSCH and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Appellants owned two tracts of land along the Columbia River, about six miles upstream from the present John Day Dam. On November 1, 1962, they leased this and other property to the state of Oregon, which wanted it for an industrial park. That industrial development, for maximum utility, required access to the Columbia River; because two railroads and the United States owned most of the land along the river, appellants' property was especially valuable as a port site. The lease agreement gave Oregon an option to purchase the land. Most of the land was priced, under the option, at $150 per acre; the balance, denominated "port site property" in the agreement, was priced at $400 per acre.

The option was never exercised. On August 13, 1963, the United States filed a Declaration of Taking in the United States District Court, condemning this and other property in connection with the river development project of which the John Day Dam is a part. On September 25, 1963, the Secretary of the Army granted this and other land to the state of Oregon by a federal deed. Its use passed to a private corporation under a lease from the [fol. 92] state of Oregon dated July 2, 1963. The record does not show and we are not told how much of the sale price or rents paid for the whole block of land involved are attributable to the two tracts in suit.

In response to the notice of taking, appellants filed a notice of appearance on September 3, 1963, contesting the amount of proposed compensation and requesting partial distribution of funds. On September 27 they filed a motion requesting permission to call their earlier appearance an answer and to amend it to raise defenses to the taking of their property. They assign as error the district court's refusal, under Rule 71A, F. R. Civ. P., to permit variance, under the excusable neglect provisions of Rules 6(b) and 60(b), from the requirement of Rule 71A that objections to the taking itself be filed within 20 days from service of the notice of taking. Upon trial of the compensation issue, the district court held, relying on *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624, that that element of value of the land arising from its utility as a port site is noncompensable under the Fifth Amendment. Appellants say that that holding too is erroneous.

I. *Late Amendment under Rule 71A, F.R.Civ.P.*

Rule 71A(e) provides that "If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him." Part (a) of the same Rule makes the other rules of civil procedure applicable to condemnation actions "except as otherwise provided in this rule." The question, therefore, is whether the 20-day period is absolute, giving the district court no authority to extend it in cases of excusable neglect, or whether the excusable neglect provisions of Rules 6(b)(2) and 60(b)(1) confer such discretion.

District Courts have held that Rule 6(b) is not applicable to mitigate the time bar of Rule 71A(e), *United States* v. *7.724 Acres of Land*, E.D. La., 1962, 31 F.R.D. 290, but that Rule 60(b) is so applicable, *United States* v. *140.80 Acres of Land*, E.D. La., 1963, 32 F.R.D. 11, 14, *United States* v. *1.108 Acres of Land*, E.D. N.Y., 1960, 25 F.R.D. 205, see also *City of Davenport* v. *Three-*
[fol. 93] *Fifths of an Acre of Land*, S.D. Ill., 1957, 157 F. Supp. 794. The language of the rules themselves offers

little guidance. The court below, in concluding that the word "shall" in 71A(e) should be construed to be mandatory, found guidance in the fact that subsection (c)(2) of the rule provides that a defendant "*may* answer as provided in subdivision (e) of this rule," and thought it persuasive that the word "shall" as used in Rule 59(b) has been construed as mandatory. But the inference drawn from use of both "may" and "shall" is unwarranted; if "shall" had been used in subdivision (c)(2), a defendant would be required to file an answer, while if "may" had been used in subdivision (e), in practical terms no due date would apply to the answer other than those provided by other rules. Nor is the fact that the "shall" in Rule 59(b) has been said to be mandatory, see *Hulson* v. *Atchison T. & S.F. Ry.*, 7 Cir., 1961, 289 F.2d 726, conclusive. Rule 6(b) is by its own terms inapplicable to Rule 59(b), while *Hulson* held Rule 60(b) to be applicable to Rule 59(b) upon a showing of "extraordinary circumstances".

A strong case can be made for the proposition that "shall", as used in 71A(e), is permissive. The rule itself contains no language requiring a different conclusion. The Advisory Committee's note to subdivision (e) manifests no intent that the twenty-day limit be absolute—on the contrary, it seems to reflect an intent to cut off pleadings preliminary to the answer, not subsequent to it, and states that "the general standard of pleading is governed by other rules . . . and this subdivision (e) merely prescribes what matters the answer should set forth." Rule 6(b) lists the other rules to which it is inapplicable, without including Rule 71A in that list. And the rules are to be construed in a liberal manner which effectuates their purpose "to secure the just, speedy, and inexpensive determination of every action" (Rule 1); here the Government itself conceded that appellants should be permitted to file a late answer.[1]

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[1] The Government's Memorandum in Opposition to Motion to Amend, while contending that Rule 71A alone was applicable to these proceedings, concluded with:

> "It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed."

[fol. 94] But we need not finally decide here whether the rule is mandatory or permissive, for in either case we think the result below was correct. The trial judge held alternatively that, assuming that he had discretion in the matter, he would deny the motion because "the defendants made no attempt to raise the question until after a substantial portion of the property had been transferred to the State of Oregon." Where, as here, the only "excusable neglect (Rule 6(b)) or "mistake, inadvertence, surprise, or excusable neglect" (Rule 60(b)) alleged is the defendant's original attorney's lack of knowledge of possible defenses to the taking, a substantial quantity of the land taken has been reconveyed after the 20-day period has elapsed and before a late answer is attempted to be filed, and the prima facie right to take is as clear as it is here,[2] we think that denial of the motion was within the scope of the district judge's discretion.

II. *Port Site Value.*

In support of its proposition that the port site value of land riparian to navigable water is not required to be paid upon condemnation, the Government relies principally upon *United States* v. *Commodore Park, Inc.*, 1945, 324 U.S. 386; *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222; and *United States* v. *Virginia Elec. & Power Co.*, 1961, 365 U.S. 624 ("VEPCO"). In *Commodore Park*, land situated on a navigable inlet whose water was kept fresh by tidal flows was rendered less valuable when the government turned the inlet into a "stagnant pool" by dumping dredged material, accumulated in the course of rendering the connecting navigable bay more suitable for military vessels, across the mouth of the inlet. It was held that the resulting loss was noncompensable because "a riparian owner [does not] acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental

[2] Here almost all of the two tracts involved were actually inundated by the waters of the reservoir created by the John Day Dam.

change in a stream . . . . Whatever market value of riparian lands may be attributable to their closeness to navigable waters does not detract from the government's [fol. 95] 'absolute' power, in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay. Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." 324 U.S. at 390-91.

In *Twin City*, the defendant power company owned land on the banks of a navigable river and on which it intended to build a private power facility, which the government took for the same use. In response to the power company's claim that the power plant site element of value of the land was compensable, it was held that "the flaw . . . is that the landowner here seeks a value *in the flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses . . . . That special location value is due to the flow of the stream . . . and in this case it is the water power that creates the special value, whether the lands are above or below ordinary high water. It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. Location of the lands might under some circumstances give them special value, as our cases have illustrated. But to attach a value of water power to the Savannah River due to location and to enforce that value against the United States would go *contra* to the teaching of [*United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53, 69]—'that the running water in a great navigable stream is capable of private ownership is inconceivable.' To require the United States to pay for this water-power value

would be to create private claims in the public domain." 350 U.S. at 226-28. (Emphasis in original.)

Vepco was similar, except that there the government took the power company's easement of flow. It was held that no power site element of value could be awarded. The government here particularly relies on the Court's state-[fol. 96] ment that "Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . [citations omitted], it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." 365 U.S. at 629.

We do not find those cases as persuasive as does the Government. *Commodore Park* dealt only with foreclosure of a privilege of access to navigable waters, not with the taking or invasion of all or any part of the defendant's tangible realty. More importantly, that case holds only that the Government may, in the exercise of its power to promote navigation, deny access to navigable waters, not that that access must not be considered when in the course of a condemnation action it is shown to represent a part of the value of the land actually taken or invaded.[3]

The result in *Twin City* proceeded logically from an almost indistinguishable holding in *Chandler-Dunbar*, and absent language to the contrary cannot be said to have departed from the settled principles which are discussed below. Indeed, it expressly acknowledged that location value is compensable in some circumstances, and refrained from disapproval of *Chandler-Dunbar's* award of compensation for a private lock and canal, a use far more closely connected with "navigation" than its use as a port site. *Vepco*, read against its facts, goes no further than *Twin City*.

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[3] Such a holding would necessarily have overruled *United States* v. *Chandler-Dunbar Water Power Co.*, *supra*, in part, as well as *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (which cases are discussed below). We find no evidence in any of the three cases discussed above of any such overruling intent, and cannot take upon ourselves what the Supreme Court has refrained from doing.

The Government claims, however, that power site value and port site value are logically indistinguishable because both depend upon proximity of the property involved to navigable water, and that the reference in the cases to the "flow of the stream" does not limit those holdings to flowing streams but rather is merely the result of the fact that those cases were concerned with flowing navigable waters. However persuasive this may be as a matter of logic, other considerations are weightier and are to the contrary. The historical treatment of analogous riparian [fol. 97] location values and the statutory framework within which condemnation and reconveyance occur combine to convince us that port site value should be compensable under the Fifth Amendment.

The foundation of the cases upon which the Government relies is *United States* v. *Chandler-Dunbar Water Power Co.*, 1913, 229 U.S. 53. There the defendant power company owned land upon the bank of St. Mary's River and subsurface land to the middle of the stream on which it had constructed, respectively, a by-pass lock and canal system and a dam for power generation. The United States, in furtherance of its purpose to improve the navigability of the stream, took all of this property. Compensation was denied for the power site value of the land, but granted as to other elements. According to the Court, "riparian owners upon public navigable waters have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank . . . . These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. . . . They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore." Id. at 70. Consequently compensation was allowed for the special value of the lock and canal and the land upon which it was situated for such purposes.[4] And as has been noted above, the Court

[4] The government apparently did not object to a particular valuation of another parcel based upon its value "for general wharfage, dock and warehouse purposes, disconnected with development of power in the rapids." *Id.* at 75.

in *Twin City* did not disapprove, much less overrule, this holding. That the principle is of some antiquity is illustrated by *Boom Co.* v. *Patterson*, 1878, 98 U.S. (8 Otto) 403, 408, which held that the location of certain islands in a navigable portion of the Mississippi River, which location gave them a peculiar value for purposes of constructing a log-retaining "boom", was properly an element for consideration in fixing the amount of compensation due the owner upon a taking by a state agency.

United States v. *River Rouge Improvement Co.*, 1926, 269 U.S. 411 (construing 40 Stat. 901, 911, c. 155, § 6, now 33 U.S.C. § 595), establishes another part of this pattern. [fol. 98] There a statute provided that where only a part of a parcel of land was taken for a river improvement project, the resulting award should be reduced by the amount of any direct benefit conferred upon the remaining land by the project. The trial court's overemphasis upon the government's continuing right to cut off the privilege of access to navigable water in the exercise of its overriding navigation servitude—which resulted in unduly reducing the "direct benefit" offset to the compensation award—was held error. "[A]n increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit within the meaning of the statute. . . ." Moreover, "it is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, ... [citation omitted] he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose . . . . [Citations omitted.]" Id. at 415. 417-18. The Court went on to note that these riparian rights are subject to the government's navigation servitude, but concluded that the mere existence of the government's power to reduce the value of riparian rights could not justify present valuation of them at a nominal amount; rather, they are to be valued in the light of a realistic estimate of the chance that the government will

in fact exercise its servitude. This is directly contrary to the position which the Government takes in the case before us, but we think that the principles announced in this and other cases discussed above are still good law and find no intimation otherwise in the more recent pronouncements of the Supreme Court.

We also find support for this conclusion in the approach which Congress has taken to the problems inherent in condemnation for river development purposes. 33 U.S.C. § 595, whose predecessor was construed in *River Rouge, supra*, still provides that where only a part of a parcel of land is taken for a river development project, "the jury or other tribunal awarding the just compensation . . . shall take into consideration by way of reducing the amount of compensation or damages any special and direct [fol. 99] benefits to the remainder arising from the improvement . . . ." Now the government argues that where all of the land is taken, that element of its value attributable to its riparian location cannot be taken into account in computing its value. This is a fundamental and inequitable inconsistency, designed to give the government the best of both worlds. But if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here, riparian location), should be paid for.

The inconsistency and the unfairness of the government's position are cast into sharper relief by 33 U.S.C. § 578. That section allows the Secretary of the Army to sell excess land for port and industrial purposes to the states or state-created agencies upon his determination that such development "on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located . . . ." It requires that any such sale be at "the fair market value of the land." Here just such a sale was made by the United States to the State of Oregon. Assuming that port site

value is an element of fair market value as that phrase is used in this statute—and we think that, absent any contrary indication in the statute, it must be so understood—then the principles of *Monongahela Nav. Co.* v. *United States*, 1893, 148 U.S. 312, 337-38, are applicable. There the government took a dam and associated lock and canal, passage through which was subject, under a franchise, to payment of a toll to the owner of the project. "After taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. [fol. 100] Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."

Further support exists in the Submerged Lands Act, 43 U.S.C. §§ 1301-1343. That act, throughout its text and legislative history, see 1953 U.S. Code Cong. & Ad. News, 1385-1640, reflects the concern of Congress that any ownership it might assert over lands beneath navigable waters not impede economic development in the States. See *e.g.*, 15 U.S. Code Cong. & Ad. News, 1479-81, 1525. Where Congress sought to confirm ownership of natural resources in the states, and through them, private persons, yet reserve certain rights to itself, it reserved only those rights which *Chandler-Dunbar* held were vested in the national government in the form of an overriding navigational servitude; 43 U.S.C. § 1301(e) defines the term "natural resources". "without limiting the generality thereof," by listing certain of such resources, then concludes with a statement that the term "does not include water power, or the use of water for the production of power," which is the resource reserved to the United States. Section 1314(a) explicitly reserves to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for

the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of* management, administration, leasing, *use, and development of the lands* and natural resources wihch are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others . . . ." (Emphasis added.)

To uphold the stand taken by the Government here would, we think, subvert this policy by inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected project. And this, under our reading of the existing law and in the face of a statutory scheme which should be read to provide fair treatment, we cannot do.[5]

[fol. 101] Here the land obviously had value as a port site. It had historically been so used, and appellants had granted the state of Oregon an option to purchase it for almost three times the apparent market price of contiguous, non-port site property. At trial, appellants made an offer of proof that the land was worth at least $50,000. They should be given a chance to prove their claims.

Reversed and remanded for a new trial on the issue of just compensation.

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[5] The courts of New York have reached the same result in *Andrews* v. *State*, Ct. Cl., 1959, 19 Misc. 217, 188 N.Y.S.2d 854, aff'd, 1960, 11 App.Div.2d 599, 200 N.Y.S.2d 451, aff'd, 1961, 9 N.Y.2d 606, 176 N.E.2d 42, *cert. denied*, 1961, 368 U.S. 929.

[fol. 102]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,280

R. B. RANDS, ET UX., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT—Filed and entered October 7, 1966

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for a new trial on the issue of just compensation.

[fol. 103]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 104]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 9, 1967

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 4, 1967.

/s/ Wm. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of January, 1967.

[fol. 105]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

UNITED STATES, PETITIONER

vs.

R. B. RANDS, ET UX.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 2, 1967

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including February 20, 1967.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 2
day of February, 1967

[fol. 106]

SUPREME COURT OF THE UNITED STATES

No. 1083, October Term, 1966

UNITED STATES, PETITIONER

v.

R. B. RANDS, ET UX.

ORDER ALLOWING CERTIORARI—April 10, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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